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No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RANDALL DIVISION OF TEXTRON, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

Whether, in order to meet fluctuating production requirements, an employer can use intraplant transfers of employees in its present workforce rather than reinstating economic strikers, when reinstating strikers would require the employer either to add unneeded employees or to displace permanent strike replacements.

Whether the National Labor Relations Board's order permitting intraplant transfers of reinstated strikers to fill shifting production needs while forbidding like transfers of permanent replacements constitutes illegal discrimination against permanent replacements.

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NATIONAL LABOR RELATIONS BOARD,
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Petition For a Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

Petitioner, Randall Division of Textron, Inc., prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Eighth Circuit enforcing in part an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court of appeals (App. A at 1a)[1] is reported at 687 F.2d 1240 (8th Cir. 1982). The findings of fact, conclusions of law and order of the National Labor Relations Board (App. A at 19a) are reported at 257 NLRB 1 (1981). The lower court's Order of October 27, 1982, denying Petitioner's Petition for Rehearing appears in Appendix A at 61a.

1. "App. A" and "App. B" refer to the appendices to this petition for certiorari. Appendix A contains the judgment, opinion, and the order denying rehearing of the court below and the decisions and orders of the National Labor Relations Board and the Administrative Law Judge. Appendix B contains the relevant provisions of the National Labor Relations Act.

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit was entered on September 9, 1982. Petitioner's timely Petition for Rehearing was denied on October 27, 1982, and on November 1, 1982, judgment was entered. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and that of the court below under Section 10(f) of the National Labor Relations Act, as amended.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are Sections 8(a)(1) and 8(a)(3). They are set forth in Appendix B.

STATEMENT OF THE CASE

This case involves the right of an employer to protect the permanence of strike replacements hired during an economic strike. At issue is whether an employer with a full complement of workers, to meet shifting production demands after a strike, may transfer a permanent replacement from one position into another, higher-paying, job without violating the strikers' rights to reinstatement. Also at issue is whether an employer is entitled to treat its permanent replacements as it has historically treated and is presently treating all working employees or whether the National Labor Relations Board can require an employer to discriminate against permanent replacements in favor of reinstated and unreinstated strikers.

This Court has not addressed the rights of permanent replacements, and their employers, since the decision in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), in which employers won the right to guarantee permanence to replacements hired during an economic strike. Petitioner asks this Court to grant certiorari to reexamine *Mackay*, to reaffirm *Mackay*, and, accordingly, to reverse the Eighth Circuit's decision.

The Operation of Petitioner's Blytheville, Arkansas, Plant

The Petitioner is engaged in manufacturing decorative automobile trim at its plant in Blytheville, Arkansas. (Tr.

624-25).[2] Two to three hundred different products, such as body side moldings, hub caps and headlight openings, are manufactured each year, and the plant's customers include every automobile maker in the United States. (Tr. 625-26). This wide variety of products requires nearly 150 different pieces of machinery, with each product line requiring a different process. Precisely which machinery is to be run at a given time depends upon customers' needs for parts as reflected in weekly customer releases. (App. A at 25a).

Because of the tremendous fluctuation in customer needs, the plant bears no resemblance to an assembly-line operation. None of the machinery operates each day, and the plant employees therefore do not work at the same job every day. (Tr. 634, 639). It is the responsibility of lower level supervisors to decide in which positions the workforce is needed and to transfer workers accordingly. Decisions regarding transfers of employees are based on a number of factors, including finished goods inventory, customer orders and machine breakdowns. (Tr. 629, 672, 719, 722, 726-27).

There are two basic categories of jobs in the Blytheville plant, production jobs and special-rated jobs. The majority of the positions are production jobs (Tr. 46), and, although placed in six different departments, production employees historically have been moved throughout the plant as needed to perform production work without regard to their department designation. (Tr. 712, 716). The remainder of the jobs at the plant are special-rated jobs. These jobs, such as buffers, roll operators, shippers, painters, hoist operators, inspectors, welders, maintenance workers and electricians, are higher-paying positions, and some require special skills.[3] All workers,

2. "Tr." refers to the transcript of the hearing before the Administrative Law Judge, filed with the court of appeals. "G.C. Exh." references are to the General Counsel's exhibits, also filed with the court of appeals. The appendix to the court below was abbreviated and consisted only of a listing of relevant docket entries and the decisions of the Board and the Administrative Law Judge.

3. The court of appeals stated that *all* of the special-rated jobs are skilled positions (App. A at 2a), but there is no evidence to support this conclusion in the record. Some of the special-rated positions require no additional skills but carry a higher wage rate simply because of the inconvenience (such as dust and dirt) associated with the job.

both in production and the special-rated classifications, historically have been transferred to, from, and within these job categories to meet production demands.[4]

The Economic Strike

On September 8, 1977, the Union[5] notified Petitioner that it was terminating the collective bargaining agreement and the employees began an economic strike, in which virtually all of the workers originally joined. Petitioner immediately began hiring permanent replacements for its striking employees (Tr. 76-77, 838) and thereby continued operations during the strike. Within a day after the strike commenced, strikers began returning to work, and on October 17, 1977, the Union made an unconditional request for reinstatement of all of the strikers.

At the end of the strike, Petitioner's active workforce consisted of approximately 360 workers, most of whom were permanent replacements, and the overall size of the workforce decreased even further during the first few months after the strike. This workforce was smaller than the normal complement of 400 workers, but it is uncontested that Petitioner did *not* need to add to its workforce at the end of the strike. (App. A at 37a). The need for fewer workers was based on a high level of finished goods inventory, which was nearly twice its normal level due to a build-up of strike protection earlier in the year. (Tr. 653, 679-82).[6] This inventory was not depleted until February 1978, which is when Petitioner began reinstating strikers in large numbers (Tr. 684), and as of March

4. This need to reshuffle the workforce was reflected in the collective bargaining agreement that expired September 1, 1977. Under the terms of the *expired* agreement, Petitioner could transfer any employee to any position for ten days without restriction and could permanently transfer an employee to a position at the same or at a lower pay level. If a long-term opening in a special-rated position arose, employees were permitted to bid on the job. (G.C. Exh. 4).

5. United Automobile, Aerospace and Agricultural Implement Workers of America and Local No. 1249.

6. During contract expiration years, Petitioner is required by its customers to have 30 days of finished goods inventory in addition to its normal three-to-four week build-up as strike protection. (Tr. 654-55, 688-89).

29, 1979, all but 17 of the 389 strikers had been reinstated. (Tr. 843). It is the period between the end of the strike on October 17, 1977, and the numerous reinstatements in February 1978—the time period during which it is undisputed that Petitioner did not need to add to its workforce—that is at issue.

Post-strike Additions to the Workforce and Transfers of Employees

Petitioner and the Union did not enter into a strike settlement agreement. When Petitioner needed to add to its workforce in a production job after the strike it offered the job to the first person on an unconditional return to work request list signed by strikers during the strike and, after that list was exhausted, to the most senior person on a list prepared after the strike. (Tr. 71-72). If Petitioner needed *to add to its workforce* in a special-rated job, it would review its workforce in the plant to determine if any striker who had been returned to a different job after the strike had held the open position prior to the strike. If no striker already at work in the plant had performed the job prior to the strike, Petitioner looked first to the return to work request list and then to the seniority list of unreinstated strikers. (Tr. 71-75). Petitioner never varied from these recall procedures, and it is undisputed that after the strike terminated, *Petitioner hired no new employees into positions held by strikers.* (App. A at 29a).

The procedures outlined above were those followed when Petitioner needed to *add* employees to its workforce. During the strike and thereafter until February 1978, however, *if Petitioner did not need to add to the workforce*, it transferred employees from one department to another to meet production needs. (Tr. 670-72, 712). It was, as always, Petitioner's policy to operate the plant "at the least possible cost and with the least amount of people." (Tr. 642, 721-23, 726-27). Accordingly, when workers were needed in a particular job, but the total complement of workers in the plant was adequate, Petitioner transferred employees from positions in which they were not needed into positions in which they were rather than

reinstating additional strikers and thereby unnecessarily adding to the workforce.

The overwhelming majority of transfers that occurred during and after the strike were within the production classification, but thirty percent of the transfers were between production and special-rated jobs. The number of transfers of reinstated strikers from production to special-rated jobs was nearly equal to the number of permanent replacements so transferred, and the number of transfers of permanent replacements *from* special-rated to lower-paying production jobs was six times the number of reinstated strikers so transferred. The remainder of the transfers were between two special-rated jobs. (G.C. Exhs. 29(b) and 29(c)). Availability of materials, machine breakdowns, loss of parts by a customer, fluctuations in customer orders, and other exigencies governed the timing and purpose of these transfers (Tr. 629, 719, 722), and, significantly, the Board acknowledged Petitioner had no discriminatory motive for making the assignments. (App. A at 34-35a). It is the legality of transferring permanent replacements into special-rated jobs between October 17, 1977, and February 1978 without reinstating additional strikers for those jobs that is the fundamental issue posed by this petition.

The Board's Decision and Order

The Board, substantially adopting the opinion of the Administrative Law Judge ("ALJ"), found that no violations occurred when Petitioner transferred any of its employees between production jobs or from special-rated to production jobs. When transfers of permanent replacements occurred from production to special-rated positions,[7] however, the Board determined Petitioner had violated the Act.

While finding that Petitioner had *not* unfairly depressed the size of its workforce, and accepting that Petitioner's

7. It is unclear whether the Board's holding "that Randall should have offered special-rated openings to strikers" (App. A at 9a) applied only to production to special-rated transfers or applied to special-rated to special-rated transfers as well.

evidence of business justification was unrefuted on the record, and determining that strikers were reinstated *as needed* (App. A at 37a), the Board nonetheless found Petitioner committed an unfair labor practice when it transferred permanent replacements into special-rated jobs to meet production needs. Relying on the Board's decision in *MCC Pacific Valves*, 244 NLRB 931 (1979), *enforcement denied in relevant part without opinion*, 665 F.2d 1053 (9th Cir. 1981),[8] the ALJ held that employers are required to prefer unreinstated strikers to employees then on the payroll unless the employer can show "substantial and legitimate business reasons for [not] doing so." (App. A at 34a). In other words, if a worker were needed in a special-rated job because of fluctuating production demands but no additional workers were needed in the workforce to meet overall production needs, the employer nevertheless was obligated to reinstate a striker to the position. The need in the special-rated position, reasoned the ALJ, constituted a "vacancy" to which a striker was entitled. Obviously, reinstatement in those circumstances would have resulted in the layoff of a currently employed worker or in the addition to the workforce of an unnecessary person.[9]

8. *MCC Pacific Valves*, on which the ALJ and Board so heavily relied, was denied enforcement without opinion by the Ninth Circuit after the Board's but before the lower court's decision in this case. The lower court nevertheless treated the case as persuasive Board precedent.

9. The ALJ's opinion contained several glaring factual errors, which, Petitioner concedes, the Board did not rely upon in its brief to the court of appeals. For example, the ALJ found that after the strike Petitioner had bid the special-rated jobs and prohibited unreinstated strikers from bidding thereon (App. A at 31-32a), which is untrue and clearly unsupported by the record. The ALJ also found that transfers to special-rated jobs occurred because of departures of permanent replacements or because of a need to add to the workforce in special-rated jobs. (App. A at 29a, 32a). Once again, such findings were wholly unsupported by the record, for there is no evidence in the record to suggest that permanent replacements were transferred from production to special-rated jobs at a time when Petitioner was adding to its workforce in special-rated jobs. (App. A at 10a at n. 9.). Nor was there evidence that Petitioner transferred workers to replace departing permanent replacements.

Although there was no evidence that Petitioner transferred workers to special-rated jobs in order to replace departing strike replacements, Petitioner contends that even had such transfers occurred, there would have been no violation of strikers' reinstatement rights because there still would have been no need to *add* to the workforce. Thus, no vacancies would have existed.

The Board's reasoning, however, was limited to permanent replacements. No violation was found when reinstated strikers were transferred into special-rated jobs. (G.C. Exh. 29(b)). Thus, a "vacancy" was created only when it was a permanent replacement being shuffled to fill a production need.

The Court of Appeals' Decision

On Petitioner's Petition for Review and the Board's Cross-Application for Enforcement of its Order, the court of appeals held that Petitioner violated the Act when it transferred permanent replacements into special-rated jobs.[10] Recognizing that "the balance between employer and employee rights in this case is difficult to strike" (App. A at 11a), the court upheld the Board's determination that a "vacancy" existed whenever a permanent replacement was transferred into a special-rated job. In a decision that virtually abdicated to the Board's "superior expertise in striking specific balances" (App. A at 9a), the court accepted the Board's analysis that when a need for a worker in a special-rated job arose, that need created a vacancy if a permanent replacement were transferred—even if the need arose from a change in production demands—and Petitioner could not fill that job by reshuffling permanent replacements. Petitioner's argument that a vacancy arose *only* when Petitioner needed to bring someone into its workforce was rejected.

Acknowledging that this Court's opinion in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), guarantees strike replacements "a measure of permanence" (App. A at 7a), the court held that transferring replacements into higher-paying jobs gave those workers an "additional preference besides permanence" similar to that condemned by this

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10. There were numerous other issues before the court for resolution, some of which were decided in favor of Petitioner and some of which were decided in favor of the Board. The primary issue, however, involved the intraplant transfer of permanent replacements to special-rated jobs and it is only that issue on which Petitioner seeks a writ of certiorari.

Court in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (App. A at 11a). That strike replacements were transferred frequently from special-rated to lower-paying production jobs was neither discussed nor acknowledged by the court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS WRONG AND CONFLICTS WITH THIS COURT'S DECISION IN *MACKAY*.

This case juxtaposes the rights of unreinstated strikers, who by law remain employees on a preferential hiring list, against the rights of permanent replacements who are currently working and on the payroll at a point in time when the employer has a full complement of employees. Both the court below and the Board refused to confront this issue head-on in their opinions.[11] Instead, they found that strikers were entitled to reinstatement without acknowledging the impact that would be visited upon permanent replacements. This Court, however, has weighed the rights of replacements vis-a-vis strikers awaiting reinstatement and has struck the balance in favor of the replacements' right to permanence. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). A decision that forces an employer to lay off these permanent replacements to make way for unreinstated strikers or to reinstate additional, unnecessary employees obliterates the rights guaranteed to employers by *Mackay*.

In *Mackay*, this Court held that an employer, faced with an economic strike, can hire replacements for strikers and can assure those replacements a permanent position.

11. Significantly, in its brief to the court below, the Board acknowledged that layoff of permanent replacements "might" result from its decision. The Board, however, adopted the stance that strike replacements have rights only to their "current" positions and may not be transferred to fulfill production needs if a striker is awaiting reinstatement. Arguing its position that the change in production needs created a "vacancy" when a move of a strike replacement to a higher-paying position was involved, the Board stated that filling these jobs with replacements gave those workers a benefit beyond permanence; therefore, Petitioner was not permitted to reshuffle the workers and thereby keep them on the active payroll.

> [I]t does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

304 U.S. at 345-46. The lower court, conceding that *Mackay* guarantees replacements a "measure of permanence," relied on *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), and *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), for its deferral to the Board's holding that strikers, not permanent replacements, should have filled the special-rated positions. This decision not only misreads and conflicts with *Mackay*, which guaranteed *permanence* and not just a "measure" thereof, but also is a misapplication of *Erie Resistor* and *Fleetwood*.

Fleetwood involved the rights of unreinstated strikers vis-a-vis new hires, not permanent replacements. *Fleetwood* held that the right to reinstatement extends to openings that arise after the striker's application but before he has obtained other, substantially equivalent, employment. It mandated that unreinstated strikers be given preference over new hires for any later arising jobs. The *Fleetwood* concept was expanded in *The Laidlaw Corporation*, 171 NLRB 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), to cover strikers whose positions are filled when they apply for reinstatement but which positions are later vacated. In both *Fleetwood* and *Laidlaw*, however, the "vacancies" at issue were positions necessitated by the employers' need to add to their respective workforces. Hence, those cases serve only to assure that an unreinstated striker, not a new hire, will fill any vacancies that arise. In this case, by contrast, it is uncontested that

Petitioner did not need to add to its workforce and that no new employees were hired after the strike.

What the Board and the lower court seek to accomplish in this case is an expansion of strikers' *Fleetwood* and *Laidlaw* rights at the expense of Petitioner's *Mackay* right of replacement and replacements' *Mackay* right of permanence. By extending the definition of "vacancy" to include jobs activated by fluctuating production demands that could be filled by a reshuffling of the current workforce, the Board and lower court have dealt strikers a card that trumps an employer's and replacements' *Mackay* rights. Under the Board's holding, an employer may not use permanent replacements after a strike in the same manner in which it has historically used its workers. If this holding is permitted to stand, replacements will be frozen into the specific jobs to which they are initially hired, despite the fact that an employer may always have depended upon a fluid workforce to meet its production needs.

In the context of the present case, as long as strikers who previously had held special-rated jobs await reinstatement, permanent replacements cannot be transferred to special-rated jobs, regardless of the reason. If a production need arises in a particular part of the plant, permanent replacements cannot be transferred to meet that need. Rather, a striker will have to be reinstated to that special-rated position, even if, as is undisputed here, the Company has no need for additional employees on its payroll, and therefore permanent replacements will have to be laid off or fired.

This holding, moreover, requires an employer to treat permanent replacements in a manner different from that in which it is using the remainder of its current workforce, *i.e.*, reinstated strikers. This restricted use of replacements constitutes discrimination against permanent replacements, in square conflict with *Erie Resistor*'s command to avoid disparate treatment between permanent replacements and reinstated strikers. It furthermore results in a degree of "permanence" that is a far cry from that mandated by *Mackay*.

The circuit court sought to justify its decision by comparing the transfers in this case to the grant of superseniority in *Erie Resistor*, saying the transfers of permanent replacements to special-rated jobs were discriminatory because they made it less likely that strikers would be reinstated to higher-paying positions. (App. A at 11a). This "finding" of discrimination ignored the fact that permanent replacements were transferred not only to but *from* special-rated jobs. Indeed, six times as many strike replacements as reinstated strikers were transferred *from* special-rated to lower-paying production jobs, belying an attempt to favor replacements. Any "preference," moreover, a replacement received derived solely from his/her status as a permanent employee, a status guaranteed by *Mackay*. The transfers resulted from Petitioner's continuation of its past practice of using the workforce where its members were needed. To find that a reshuffling of the workforce that includes transfers of replacements into higher-paying jobs equates with the "superseniority" of *Erie Resistor* is to stretch that case far beyond its scope.

Because the lower court's reliance on *Erie Resistor* and *Fleetwood* was unwarranted, so, too, was its conclusion that Petitioner's conduct was "inherently destructive" of strikers' rights and that the Board thus was relieved of its burden of proving antiunion motivation. (App. A at 8-9a, n. 7). Petitioner's use of transfers, being firmly grounded upon the principles articulated in *Mackay*, was no more "inherently destructive" of strikers' rights than *Mackay* itself. Consequently, because Petitioner demonstrated legitimate and substantial business justification for its use of transfers, the Board was required to prove union animus. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The court below therefore erred in ignoring the Board's failure to meet its burden and, indeed, the ALJ's finding that Petitioner had no discriminatory motive for making the assignments. (App. A at 34-35a).

A further flaw with the Board's and lower court's analysis is its condemnation of transfers *only* into higher-paying positions. Petitioner and other employers remain free

to use their current workers as and where they are needed only so long as the production need does not arise in a more attractive job. When production demands call for a start-up of a higher-paying position, which is often accompanied by a concomitant slowdown in similar or lower-paying jobs, an employer's hands are tied. It cannot use permanent replacements to meet that particular production need. Such a holding eviscerates the *Mackay* right to hire permanent replacements.

Finally, the lower court's finding that the Board's order "does not infringe on the permanence of replacements" (App. A at 12a) reflects an acceptance of the Board's determination that permanent replacements are frozen into their current positions. When a need for that particular position disappears through shifting production demands, the replacement's right to permanence apparently also vanishes and therefore is not "infringed" by a forced layoff or termination. If such an erosion of replacements' *Mackay* rights is to occur, it is this Court that should make that determination.

II. THE DECISION BELOW RAISES A CONFLICT IN PRINCIPLE BETWEEN THE EIGHTH AND THE SEVENTH AND THE SECOND CIRCUITS.

The lower court's decision in this case, in Petitioner's opinion, creates a sharp conflict in principle with the Seventh Circuit's recent decision in *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982), and with the Second Circuit's decision in *Lodges 743 and 1746, I.A.M. v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).

In *Giddings & Lewis*, the Seventh Circuit denied enforcement to an order of the Board and held that strikers do not have a right to be reinstated before laid off permanent replacements with less seniority are recalled. The employer in *Giddings & Lewis* had devised a policy that in effect assured that permanent replacements and reinstated strikers would not lose their positions to more senior unreinstated strikers should a layoff occur. Rejecting the

Board's finding that the layoff of a permanent replacement created a "vacancy" to which unreinstated strikers were entitled, the court stated:

> We find the *Mackay* rule to be dispositive of this case. The employer here has hired replacements for economic strikers and assured the replacements, through promulgation of the seniority rules in question, that the positions are permanent. In light of the inevitable fluctuations which occur in the nation's economy, with their concomitant impact on the labor force, such a system serves only to assure replacements the permanent status to which *Mackay* says they are entitled. Affirmance of the Board's holding that layoffs activate a striker's right to reinstatement would eviscerate the *Mackay* rule. Employers attempting to hire replacement workers could guarantee them employment only until a layoff occurred. Such replacement workers could hardly be called "permanent." In the event of a layoff, unreinstated workers would inevitably replace their "permanent" replacements. Such an outcome would significantly interfere with what the *Mackay* Court found to be the employer's legitimate interest in maintaining production during an economic strike.

675 F.2d at 930.

If "transfer" is substituted for "layoff" in the above-quoted excerpt, the language applies with full force to the instant case. Like the employer in *Giddings & Lewis*, Petitioner merely sought, through transfers, to assure replacements the permanence guaranteed by *Mackay*. The only way Petitioner could assure permanence to the strike replacements in light of the fluctuating production needs that prevailed during and after the strike was to use all possible combinations of transfers, including production to special-rated transfers. Had Petitioner limited its options to production-to-production transfers and special-rated-to-production transfers, the strike replacements' permanence would have been eroded substantially.

The Seventh Circuit in *Giddings & Lewis* soundly rejected the Board's reliance on *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, and *Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). The court correctly recognized that *Erie Resistor* involved only the rights of strikers who have been *reinstated* and noted that reinstated strikers and permanent replacements were treated even-handedly by the employer. The same is true in this case, as both reinstated strikers and permanent replacements (as well as employees who abandoned the strike before its end) were transferred to meet production needs. The court found *Fleetwood* and *Laidlaw* easily distinguishable, in that those cases simply assured that qualified strikers would be reinstated ahead of any new applicants. In this case, it is undisputed that after the strike Petitioner hired no new applicants into jobs held by strikers. Thus, the Seventh Circuit's opinion, while factually dissimilar, is based on reasoning in square conflict with that employed by the Eighth Circuit in this case.

The Eighth Circuit's decision similarly cannot be reconciled with the Second Circuit's opinion in *Lodges 743 and 1746, I.A.M. v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). In that case, the Second Circuit rejected the union's contention that an employer could not transfer or promote replacements to correct production imbalances caused by an economic strike. Interpreting a strike settlement agreement as well as the Act, the court found the company was not required to reinstate a striker where to do so would result in the layoff of an active employee:

> No case insofar as we are aware, has required an employer to layoff its active employees so as to make room for strikers. And any such approach would be fundamentally inconsistent with an employer's right to hire permanent replacements for strikers and retain the replacements after the strike while the strikers remain out of work. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

534 F.2d at 442. The court added that "it would not make sense" to permit an employer to hire permanent replacements but to then "require that those replacements be laid off as a result of production adjustments...." *Id.* at n.35. *Erie Resistor* was deemed inapplicable, for "the promotions and transfers had no effect on the strike itself and caused no lingering ill-effects within the plant except in the same sense that Mackay might engender embitterment by permitting some strikers not to be reinstated." *Id.* The court remanded for a determination of whether the transfers or promotions were in fact made to correct a production imbalance.[12]

In this case, the record contains unrefuted evidence that Petitioner transferred employees only to meet fluctuating production needs that could be met without adding to the workforce. (Tr. 670-72, 712). For Petitioner to have reinstated strikers to special-rated jobs rather than transferring permanent replacements to those jobs would have required Petitioner either to lay off or to terminate the replacements who otherwise would have been transferred. And as *United Aircraft* reasons, no case has required such an approach. The decision of the Eighth Circuit, therefore, is at odds with the Second Circuit's decision in *United Aircraft.*

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12. On remand, the lower court found no evidence to support the contention that the promotions were necessary to prevent the layoff of active employees. The strike had occurred some 20 years earlier, and necessary evidence was no longer available. The court found that a failure to fill the positions left vacant by the promotions was insufficient to establish that the promotions were made because of shifting production demands. *Lodges 743 and 1746, I.A.M. v. United Aircraft Corp.*, 604 F.2d 4 (2d Cir. 1979).

In the instant case, however, ample evidence of shifting production demands necessitating transfers was produced and remained unrefuted. The Board, moreover, in this case takes the position that replacements must be laid off, rather than transferred to a special-rated job, even when that job arises from production demands. (Board's Brief at 17-20). Thus, a conflict with the reasoning of *United Aircraft* is presented.

III. THIS CASE HAS GREAT PRACTICAL IMPORTANCE FOR EMPLOYERS SEEKING TO HIRE AND TO USE PERMANENT REPLACEMENTS DURING AND AFTER ECONOMIC STRIKES.

The work stoppage that gave rise to the instant proceedings is, in significant respects, a paradigm of the stoppages that occur throughout the United States each year. The work stoppage at Petitioner's Blytheville facility lasted thirty-nine days,[13] occurred after the existing collective bargaining agreement had expired and attempts to renegotiate a new one had failed,[14] and involved production and maintenance workers.[15]

This case is exemplary not only in terms of raw data but also in terms of employers' hiring of permanent replacements in the face of an economic strike. As the mean duration of work stoppages throughout the United States increases,[16] the likelihood that affected employers will resort to hiring permanent replacements to safeguard their businesses also increases.

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13. Thirty-one percent of all work stoppages which occurred during the period 1976-80 lasted 30 days or longer; 36% of all workers engaged in work stoppages were engaged in stoppages of such duration. Seventy-nine percent of the total days idle due to work stoppages were attributable to these longer stoppages.

The foregoing statistics and those included in footnotes 14, 15, and 16, *infra*, were obtained from the following publications prepared by the Bureau of Labor Statistics of the U.S. Department of Labor: *Analysis of Work Stoppages, 1980*, Bulletin 2120 (March 1982); *Analysis of Work Stoppages, 1979*, Bulletin 2092 (April 1981); *Analysis of Work Stoppages, 1978*, Bulletin 2066 (June 1980); *Analysis of Work Stoppages, 1977*, Bulletin 2032 (1979); and *Analysis of Work Stoppages, 1976*, Bulletin 1996 (1978). Figures in the footnotes represent annual means for the period 1976-80 computed from the statistics compiled by the Department of Labor.

14. Work stoppages occurring at the renegotiation of an existing collective bargaining agreement accounted for 62% of all stoppages, 72% of all workers engaged in stoppages, and 88% of all days idle attributable to work stoppages.

15. Eighty-three percent of all work stoppages involved production and maintenance workers, 73% of all workers engaged in work stoppages were production and maintenance workers, and 76% of all days idle involved production and maintenance workers.

16. The mean duration of work stoppages was 32 days.

Through the definition of "vacancy" adopted in this case, therefore, the Board has stripped *Mackay* of its meaning for a large group of employers and permanent replacements. For any employer that flexibly uses employees as and where needed, this decision will frustrate the import of *Mackay*.

Until now, *Mackay* has assured employers they may guarantee their replacements a permanent position in the workforce. The Board's decision in this case, however, forbids employers from using those replacements as they would other workers. A "permanent" replacement cannot be shuffled to fulfill shifting production demands but is limited to job preference only so long as a need exists for the specific duties for which he was hired or for a lower-paying job. In a plant such as Petitioner's, where workers have historically been shifted to meet fluctuating production needs, the Board's new position renders meaningless a promise of "permanence."

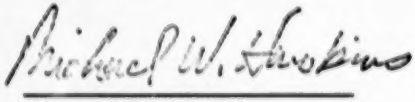
It is true that on the facts of this case, the Board declared transfers a violation of the Act only when they involved assignment of strike replacements to higher-paying positions. But the reasoning of the case is not so limited. Whenever the position transferred into is in any way more attractive than is the one transferred from—for example, more pleasant physical surroundings or less arduous work—a permanent replacement cannot be moved. This limitation will prevent necessary transfers of permanent replacements in any plant that lacks identical wages, working conditions and hours for all positions into which the active workforce has historically been shuffled.

To freeze permanent replacements out of work that happens to arise, even temporarily, in the more attractive jobs, is to make their permanence illusory. And an employer who can offer replacements only this emasculated guarantee of "permanence" will face serious difficulties in recruiting replacements for its striking workers. For these employers, the Board has loaded the *Mackay* economic weapon with blank bullets.

CONCLUSION

The Board's decision, as enforced by the Eighth Circuit, conflicts with this Court's holding in *Mackay*. Its reasoning, furthermore, is at odds with that expressed by the Seventh and Second Circuits. For these reasons, and for all of the reasons stated above, Petitioner respectfully urges that the petition for a writ of certiorari be granted.

Respectfully submitted,



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Opinion of the Court

RANDALL, DIVISION OF TEXTRON, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 81-1831.

United States Court of Appeals, Eighth Circuit.

Submitted April 12, 1982. Decided Sept. 9, 1982.

Before ARNOLD, Circuit Judge, STEPHENSON, Senior Circuit Judge, and HANSON,* Senior District Judge.

ARNOLD, Circuit Judge.

This matter comes before the Court on petition of Randall, Burkhart/Randall Division of Textron, Inc. (Randall) for review of an order of the NLRB holding that Randall committed unfair labor practices in connection with an economic strike by the employees at Randall's plant in Blytheville, Arkansas, in 1977. The case presents several issues arising from the manner in which strikers were reinstated to Randall's active work force following the strike. The primary dispute concerns whether the NLRB correctly determined that Randall's policy of offering special-rated jobs to unreinstated strikers only if no one in the active work force was qualified for and wanted the job, was an unfair labor practice. We enforce the NLRB's order with respect to that issue. With repsect to the remaining issues, we grant enforcement in part and deny enforecement in part.

I.

Randall's Blytheville plant manufactures automotive trim such as body side moldings, wheel openings, hub caps, and headlight openings. Its customers include all the major automobile manufacturers. Randall's production schedule varies in response to changes in weekly customer orders and in the size of the finished-goods inventory. In meeting

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* The Hon. William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

production needs, the plant manager of course strives to operate the plant in the most efficient manner with the fewest employees. On the average, Randall employs approximately 400 production and maintenance employees.[1] Randall's need for employees occasionally varies with changes in its production schedule, but according to the plant manager, the size of the work force ordinarily remains stable (Tr. 663).

Randall's plant is divided into a number of different departments, and employees within the various departments are classified as either production workers or "special-rated" workers depending on the nature of the tasks they perform. Production positions require no special skills and are all compensated at the same rate of pay. Special-rated positions, on the other hand, do require additional skills and consequently are more highly compensated.[2]

On occasion, Randall shifts its employees within and between departments in response to changes in its production requirements. Under the three-year collective-bargaining agreement with the Union which expired September 1, 1977, Randall could temporarily transfer any employee to a different position for ten days or less without restriction. Randall also had the right to move an employee permanently between departments to a position at the same or a lower pay level. However, whenever a special-rated position opened up, the agreement required Randall to follow a posting procedure, allowing any interested employee to bid on the job. The contract specified that the job should be awarded to the most qualified bidder or, among equally qualified bidders, to the one with the most seniority. Only if the bid procedure produced no eligible, qualified applicants could Randall fill special-rated openings from outside the workforce.

When the collective-bargaining agreement between Randall and the Union expired in 1977, the parties were

1. These employees are members of the United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 1249, hereinafter referred to as the Union.

2. Examples of special-rated jobs are buffing, rolls, tool and die, maintenance, and inspection.

unable to agree to a new contract. On September 8, 1977, the employees struck to bolster their bargaining position. The strike lasted until October 16, 1977, when the Union accepted Randall's latest offer and made an unconditional request to return to work. All the employees in the bargaining unit, except for five janitors and one production worker, joined in the strike at its outset. During the course of the strike, Randall continued operations by hiring permanent replacements for the strikers. In addition, a steady stream of individual strikers requested leave to return to work during the course of the strike. On September 19, 1977, Randall began keeping a list of such strikers (hereinafter referred to as the sign-up list). Thereafter, Randall offered job openings to the people on the sign-up list in preference to hiring permanent replacements.

Although the sign-up list was created and maintained for the benefit of voluntarily returning strikers, there was one occasion on which Randall allegedly solicited employees to sign the list. About two weeks after the strike began, employee Woodrow Robinson called the plant manager and asked to return to work. Because he feared retaliation by other strikers if he came to the plant to sign the list, he asked that someone bring the list to him. When the personnel director brought Robinson the list, Robinson noticed that he was being observed by his neighbor and fellow striker, Gary Stevens. To divert suspicion from himself, Robinson suggested that the personnel director ask Stevens if he desired to return to work. The personnel director obliged, Stevens said he was not interested, and that was the end of the incident.

Over the course of the strike, Randall hired 422 permanent replacements, not all of whom stayed on. At the end of the strike, the active work force numbered approximately 360, including both permanent replacements and previously reinstated strikers.[3]

3. The work force was smaller at the end of the strike than at the beginning because Randall had built up its finished-goods inventory to a high level prior to the strike to allay its customers' concern about potential disruptions in service during the strike. This buildup was not depleted until February, 1978, which is when Randall began reinstating strikers in large numbers.

Randall adopted the following procedure for recalling and reinstating strikers after the strike. When additional production workers were needed, Randall first recalled persons on the sign-up list, in order of signing. After exhausting the sign-up list, Randall recalled persons on the list submitted by the Union, in order of seniority. When special-rated positions became available, Randall first attempted to fill them with workers from within the plant, if any had the necessary qualifications. If no one within the plant had previously performed the job, Randall then recalled the first qualified striker appearing on the above-mentioned lists.

Between September, 1977, and February, 1978, Randall reinstated some 40 strikers. During this period Randall also recalled 13 permanent replacements who were allegedly on leaves of absence, transferred five security guards into production positions, reinstated two permanent replacements (the Turnages) who voluntarily quit and then asked to return a week later, and transferred at least 20 permanent replacements from production to special-rated positions. See General Counsel's Exhibit 29(B). After February, 1978, Randall began recalling strikers in larger numbers, and as of March 29, 1979, all but 17 of the 389 strikers had been recalled.

Returning strikers found their working conditions and benefits somewhat changed. Under the expired collective-bargaining agreement, more senior employees had been permitted to transfer to more desirable shifts, but after January 1, 1979, Randall refused to allow employees to use seniority for shift preference. Also, the strikers' insurance coverage was suspended until 60 days after they returned because of the hiatus in their active work status.

On January 16, 1978, the Union filed an unfair-labor-practice charge alleging a variety of statutory violations. The NLRB issued a complaint against Randall on March 1, 1978, and Administrative Law Judge (ALJ) Robert Cohn presided over the hearing on the complaint, which took place on various dates from November, 1978 to September, 1979. The ALJ made his decision on August 14, 1980, holding that Randall had violated § 8(a)(1) and (3) of the National Labor

Relations Act (the Act), 29 U.S.C. § 158(a)(1) and (3), in six respects: (1) by preferring permanent replacements to unreinstated strikers for special-rated jobs, (2) by recalling 13 permanent replacements from alleged leaves of absence rather than recalling strikers, (3) by rehiring the Turnages instead of recalling strikers, (4) by transferring five security guards into production positions instead of recalling strikers, (5) by failing to allow returning strikers to exercise shift preference on the basis of seniority, and (6) by interrupting the returning strikers' insurance coverage. On July 21, 1981, the NLRB adopted the ALJ's recommended order in full, with the additional finding that Randall had also committed an unfair labor practice in soliciting Gary Stevens to abandon the strike. Randall applied to this court for review of the NLRB's order, and the NLRB cross-petitioned for enforcement.

II.

A. *Vacancies In Special-Rated Jobs*

The central issue in this appeal stems from the NLRB's holding that Randall should have considered unreinstated strikers in preference to permanent replacements for openings in special-rated positions. The NLRB determined that Randall's policy of first offering all special-rated job openings to employees on the payroll instead of to unreinstated strikers discriminated against the strikers on the basis of their participation in union activity. See *Little Rock Airmotive, Inc. v. NLRB*, 455 F.2d 163, 165-168 (8th Cir. 1972), adopting *Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969), (an employer must reinstate economic strikers when vacancies arise for which the strikers are qualified, unless there is a valid business reason for denying reinstatement), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 100 (1970).

Randall argues that its reinstatement policy was not discriminatory because it did offer all "vacancies" in both production and special-rated positions to unreinstated strikers. In defining vacancy, Randall distinguishes between

job openings created and filled by transfers within the existing active work force and job openings resulting from expansion of the work force. According to Randall's interpretation, only the latter openings are vacancies which the law requires to be offered to unreinstated strikers.

The NLRB reached a different conclusion regarding the definition of vacancy. The NLRB agreed with Randall that vacancies did not appear every time production workers were reshuffled among various production jobs, but it did not agree that transfers to special-rated jobs fell in the same category. Instead, the NLRB reasoned that because special-rated jobs require particular skills, they are not interchangeable either with production jobs or with each other. The NLRB's conclusion that special-rated job openings were vacancies which should have been offered to strikers is supported by the posting procedure for such positions contained in the expired collective-bargaining agreement. Thus, prior to the strike, Randall did not unilaterally move employees into special-rated openings, but rather awarded those positions to the most qualified and senior employees who applied. The NLRB decided that Randall's post-strike policy of preferentially considering active employees for special-rated openings discriminated against strikers, because at least some of the openings appeared when replacements left. The preference was given regardless of how an opening arose, and not just when Randall was reshuffling its work force.[4]

In deciding which of the above definitions of vacancy to accept, a brief overview of the development of the right to reinstatement following an economic strike will be helpful. The Supreme Court established the basic ground rules in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938). *Mackay Radio* identifies the two competing interests which must be reconciled in defining the scope

4. To similar effect, see *MCC Pacific Valves*, 244 NLRB 931 (1979) (employer could not prefer replacements to strikers when filling job openings, at least some of which arose because of the departure of permanent replacements), *enforcement granted in part and denied in part without opinion*, 665 F.2d 1053 (9th Cir. 1981).

of the right to reinstatement: the employees' right to strike and the employer's right to carry on his business. The Court decided that an employer is entitled to solicit replacements by guaranteeing them a measure of permanence, even though as a result strikers may be induced to abandon the strike to avoid being replaced. On the other hand, strikers remain employees[5] who are entitled to be reinstated to vacancies, although they may not displace permanent replacements.

The Supreme Court restricted the extent to which employers may guarantee permanence to replacements in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963). The employer in *Erie Resistor* had announced during an economic strike that all permanent replacements and early-returning strikers would receive a 20-year seniority credit to shield them from future layoffs. The NLRB determined that such a grant of "superseniority" (which as a practical matter broke the strike because of the large number of strikers who were induced to return to work) posed an unacceptable disincentive to the employees' right to engage in concerted activity. In enforcing the NLRB's order, the Supreme Court noted that the NLRB is best equipped to balance the competing interests of employers and employees.

> Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life, [citations omitted] and of "[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases" from its special understanding of "the actualities of industrial relations." *Labor Board v. United Steelworkers*, [357 U.S. 357 [78 S.Ct. 1268, 2 L.Ed.2d 1383] (1958)] at 362-363 [78 S.Ct. at 1271]. "The ultimate problem is the balancing of the conflicting legitimate

5. See § 2(3) of the Act, 29 U.S.C. § 152(3) ("employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment...").

> interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Labor Board v. Truck Drivers Union,* 353 U.S. 87, 96, 77 S.Ct. 643, 647, 1 L.Ed.2d 676 [1957].

Erie Resistor, 373 U.S. at 236, 83 S.Ct. at 1149.

In a pair of 1967 decisions further defining the framework for balancing employers' and economic strikers' competing interests, the Supreme Court again noted that the actual balancing task is best left to the NLRB. *NLRB v. Great Dane Trailers,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), presented the question of whether an employer committed an unfair labor practice in refusing to pay strikers the accrued vacation benefits which it paid to permanent replacements, early-returning strikers, and nonstrikers. The Court upheld the NLRB's decision in favor of the strikers, finding that the employer's conduct was "'inherently destructive of employee interests.'" 388 U.S. at 33, 87 S.Ct. at 1797 (quoting *NLRB v. Brown,* 380 U.S. 278, 287, 85 S.Ct. 980, 986, 13 L.Ed.2d 839 (1965)). The Court set up the following balancing test: if it can be shown that the employer's conduct adversely affected employee rights, the burden shifts to the employer to prove a legitimate and substantial business justification. If the harm to employee rights is slight, and the employer shows business justification, the burden then shifts back to the charging party to show discriminatory motivation. However, no proof of anti-union motivation is required if the harm to employee rights is relatively great or if the employer fails to show business justification.

Great Dane emphasized that within this general framework, it is the province of the NLRB "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." 388 U.S. at 33-34, 87 S.Ct. at 1797-98. Similarly, in *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967) (the right to reinstatement does not

depend on whether an employer has a vacancy on the specific day a striker applies to return to work), the Supreme Court confirmed that the balancing function "is the primary responsibility of the Board and not of the courts...." 389 U.S. at 378, 88 S.Ct. at 545.[6]

In sum, the framework articulated by the Supreme Court identifies the competing interests of employer and employee, sets our general guidelines for decision-making, and recognizes the NLRB's superior expertise in striking specific balances within those guidelines. Thus, unless the NLRB has clearly misapplied the law or misperceived the facts, we will not second-guess its judgment.

In holding that Randall should have offered special-rated openings to strikers, the NLRB decided that Randall had violated the strikers' right to reinstatement without proving a business justification.[7] The NLRB followed its decision in the analogous case of *MCC Pacific Valves, supra* n.4.[8] In

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6. For a recent statement of the Supreme Court's deference to the NLRB in matters of applying labor policy to specific fact situations, see *Charles D. Bonanno Linen Service, Inc. v. NLRB*, ____U.S.____, ____, 102 S.Ct. 720, 728, 70 L.Ed.2d 656 (1982) (upholding Board's decision to refuse to accept impasse as basis for employer's withdrawal from multi-employer bargaining unit) ("[T]he dissenting Justices would have us substitute our judgment for those of the Board with respect to the issues that Congress intended the Board should resolve. This we are unwilling to do.").

7. Randall argues in its brief that the NLRB's decision was unjustified because there was no finding of anti-union motivation. However, under *Great Dane* and *Fleetwood Trailer*, such a finding is unnecessary unless the harm to employees is slight and the employer proves a business justification. We cannot agree that the harm to employees in this case was "slight," and the Board found that Randall had not proved a business justification.

8. Randall urges the NLRB should have looked either to *Bancroft Cap Co.*, 245 NLRB 547 (1979), or *Kennedy & Cohen of Georgia, Inc.*, 218 NLRB 1175 (1975), instead of *MCC Pacific Valves* for its definition of vacancy. *Bancroft Cap* held that an employer could recall laid-off employees before reinstating strikers where the layoffs "were for periods of only 2 to 7 days and were due to shortages of materials," 245 NLRB at 547 n.1. *Kennedy & Cohen* held that an employer could transfer a supervisor to a sales position instead of reinstating a striker, because due to a business slowdown, the employer did not need more employees. Both of these cases illustrate that employers may refuse to reinstate strikers to certain positions *if* they have legitimate business reasons. As discussed below, the NLRB found Randall's business justification to be unconvincing.

MCC Pacific Valves, as here, the employer claimed to be justified in filling openings with active employees because it was internally restructuring its work force. The NLRB rejected that argument, finding that "at least some job vacancies occurred because of the departure of strike replacements from those jobs.... In opening those jobs for bidding, and in filling them, Respondent was *not* entitled to prefer strike replacements then on the payroll to qualified strikers awaiting reinstatement." 244 NLRB at 933.

The employer in *MCC Pacific Valves* complained that if it were required to reinstate strikers to positions that could be filled by active employees, the net result would be either overemployment or displacement of employees who were entitled to remain on the job. However, the NLRB found that the employer was adding to its work force at the same time that it gave bid preference to active employees. The practical effect of the employer's scheme was to reserve jobs in higher classifications to nonstrikers. Strikers were eventually reinstated, but only to jobs in which no active employee was interested.

Randall asserts that *MCC Pacific Valves* is inapplicable because the record here does not show discrimination against strikers during expansion of the special-rated work force.[9] We think a more relevant questions is whether Randall discriminated against strikers when it was hiring employees for any portion of its work force, not just the special-rated segment. The record shows that continuously from the end of the strike, while certain strike replacements departed, others were transferred to special-rated jobs, and still others were rehired and recalled from inactive status, all during the same periods

9. "There is absolutely no evidence in the record to suggest that permanent replacements were transferred from production to special-rated jobs at a time when the Company [Randall] was adding to its work force in special-rated jobs." Petitioner's Brief at 25. This argument reflects Randall's basic definition of "vacancy" as an opening arising during expansion of the work force.

of time as some strikers were being reinstated.[10] Whether or not these events were causally related, the practical effect of Randall's procedure, just like that in *MCC Pacific Valves*, was to make it less likely that strikers would be reinstated to higher-paying positions. Randall's procedure was discriminatory in the same sense as the grant of superseniority in *Erie Resistor*; Randall gave an additional preference besides permanence to those who remained at work as opposed to those who struck, despite the fact that the latter were still "employees" for legal purposes.

The NLRB applied the correct legal principles, and the record contains substantial evidence supporting its factual conclusions. Although we recognize that the balance between employer and employee rights in this case is difficult to strike, in circumstances where the NLRB is better equipped to apply the law to the facts, we decline to reverse its judgment unless it is clearly wrong.

Randall argues that the recent case of *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982), shows that the NLRB's judgment in the instant case is clearly wrong. The question in *Giddings & Lewis* was whether unreinstated economic strikers have a right to reinstatement prior to the recall of laid-off permanent replacements with less seniority. The employer's business justification for preferring laid-off employees to strikers was preservation of the current work force. The NLRB held that giving preference to all laid-off employees regardless of the length or cause of their layoffs was equivalent to a grant of superseniority and therefore was illegal discrimination against strikers. *Giddings & Lewis, Inc.*, 255 NLRB No. 93, 106 LRRM 1391 (1981). The Seventh

10. Although the overall size of Randall's work force decreased during the first few months following the strike, Randall still needed to add and transfer employees to make up for departures of replacements. For example, the General Counsel showed that between the end of the strike and the end of 1977, 40 replacements departed, and 59 replacements were transferred to different jobs (13 from production to special-rated jobs). See General Counsel's Exhibit 29(B), ALJ's opinion at 8. Also during that time, 13 replacements were recalled from so-called leaves of absence, two replacements were rehired after they had quit, and eight strikers were reinstated. See General Counsel's Exhibits 29(B), 29(D).

Circuit reversed, holding that because layoffs do not terminate the employment relationship, they do not create vacancies to which strikers are entitled to return. The Seventh Circuit viewed the employer's practice simply as a mechanism to assure permanence to permanent replacements, permissible under *Mackay Radio.*

The case at bar differs from *Giddings & Lewis* in that here the NLRB's order does not infringe on the permanence of replacements. It simply requires that special-rated openings must not be preferentially offered to currently working personnel. It does not require that permanent replacements be discharged or displaced. In *Giddings & Lewis,* the Seventh Circuit took the view (with which we have no quarrel) that the lay-off of a permanent replacement, who had been given a definite expectation of recall, did not amount to a "vacancy." Here, by contrast, the Board permissibly treated openings in special-rated jobs as "vacancies." We find it unnecessary and undesirable to second-guess the NLRB's judgment. Neither the employer's nor the employees' interests are clearly preeminent, and the NLRB is the most appropriate body to decide between them.

B. *Leaves of Absence*

The NLRB found that Randall violated the Act in recalling 13 permanent replacements to work on December 5, 1977, instead of reinstating strikers to those positions. Randall argued that the 13 replacements were entitled to return to work because they were on leaves of absence. According to *Bankcroft Cap, supra,* 245 NLRB at 547 n.1, 551, if an employee on layoff or leave of absence has a reasonable expectation of recall, his employment relationship has not terminated and his position does not become a vacancy which must be filled by a striker.

The NLRB did not reach the question of whether these 13 replacements could reasonably expect to be recalled, because there was insufficient proof that they were in fact on leaves of absence. The 13 apparently ceased working for

a variety of reasons,[11] but none of their departures was originally an official leave of absence. That label was attached later, when Randall decided to recall them to work.[12] The NLRB determined that these 13 employees did not depart from Randall on leaves of absence, and that Randall therefore violated the Act in preferentially recalling permanent replacements instead of strikers. We conclude that substantial evidence on the record as a whole supports the NLRB's determination. Randall contends that the recall of permanent replacements does not demonstrate the existence of vacancies, but we hold otherwise. Since Randall decided on December 5, 1977, that it could accommodate 13 additional active workers, it should have recalled strikers, not permanent replacements who had left the work force entirely.

C. *The Turnages*

In December of 1977, Randall rehired a pair of strike replacements who had voluntarily quit. Cheryl and Louis Turnage left their jobs at Randall on December 8 and 14, respectively, after informing the personnel director that they had sold their house and were moving to California. Shortly thereafter, they asked to be reinstated to their jobs, because their house sale had fallen through. The company decided it could use them and rehired them both on December 27. The Turnages soon completed the sale of their house, and they

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11. Gerald Hopkins, the only one of the 13 who testified at trial, explained that he called in sick one day. The following day, when he returned to work, his supervisor informed him the company could no longer use him, which he interpreted to mean he was fired.

12. The personnel director testified that the recalls came about when he discovered paychecks being issued to employees who were not at the plant. He called the employees, told they they would be written off if they did not return to work immediately and *then* placed a "leave of absence" notation on their files. See Transcript at 767-69. He admitted that when he first contemplated contacting the 13, he "didn't have any idea what the status of those people were." *Id.* at 767. Randall argues that there was a good reason for granting a leave of absence to each of these employees, and thus that is the most suitable interpretation of their status regardless of when the official action was taken. We disagree. If we were to permit such a retroactive grant of leaves of absence, we would be sanctioning a simple method to avoid reinstating strikers.

again quit on December 30 and January 13, respectively.

The NLRB decided that Randall's reinstatement of the Turnages was no different from its recall of the 13 employees on "leave of absence." In the Board's view, the positions to which the Turnages returned were also vacancies which should have been offered to strikers.

Randall argues that because the Turnages returned on a temporary basis, their positions were not vacancies which could have been filled by strikers. See *Certified Corp.*, 241 NLRB 369, 373 (1979) *(Laidlaw* reinstatement rights did not apply to a temporary part-time position which was not substantially equivalent to a striker's former full-time employment). The General Councel disputes Randall's assertion that it rehired the Turnages only on a temporary basis, but the record bears out the temporary nature of their return.[13] The temporary position in *Certified Corp.* was created to cope with production needs, whereas here Randall rehired the Turnages as a favor to them, but whatever the reason, the net result is the same. The existence of a temporary job is not the equivalent of a vacancy to which a striker should have been reinstated.

D. *Security Guards*

The NLRB also treated Randall's transfer of five security guards into production positions at the beginning of January, 1978, in the same way as the recall of the 13 employees on "leaves of absence." During the strike, Randall hired some 12 security guards to provide security for the plant. Randall later determined that it did not need such a large security force, and accordingly it cut back to a total of seven security guards. Randall transferred the remaining guards into production positions because it hired them in "good faith" and didn't wish to terminate them.

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13. The personnel manager testified: "I didn't actually rehire them. I just reinstated them back in and then they worked a couple more weeks or so and then they sold their house and left." (Tr. 763).

The Board found that Randall made no commitment of permanence to the security guards. On the contrary, the guards were hired during a period when Randall perceived a need for increased security because of the strike (Tr. 775). When the perceived need declined, the extra guards were effectively temporary employees whose temporary positions had run out. Randall's asserted "good faith" in hiring them does not constitute a business reason for transferring them into available production positions instead of reinstating strikers. We uphold the NLRB's conclusion on this point.

E. *Shift Preference*

Under the collective-bargaining agreement in effect prior to the strike, employees at Randall were permitted to use their seniority to transfer to preferred shifts. Following the strike, Randall unilaterally discontinued the shift-preference practice. The NLRB determined that Randall had thereby discriminated against returning strikers because it treated them as new employees for purposes of department and shift assignments.[14] The Board relied on *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 840-41 (5th Cir. 1978), *enforcing* 224 NLRB 393 (1976), in which the court held that the employer violated the Act by replacing its rotating-shift policy with a fixed-shift policy following a strike, so that returning strikers were permanently assigned to less desirable shifts.

Randall argues that this case differs from *Moore Business Forms* because for Randall's employees, shift preference was not a policy, but simply a provision in the expired collective-bargaining agreement. Following expiration of the agreement, Randall did not change its policy, but rather ceased abiding by an agreement which was no longer in force. Randall

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14. *Cf. Kansas City Power & Light Co. v. NLRB*, 641 F.2d 553 (8th Cir. 1981). This Court held that an employer violated the Act by requiring returning strikers who had been on probation prior to the strike to recommence their probationary periods as though they were new hires. "Such conduct, when considered from a common sense point of view, is bound to have a discouraging effect on present and future concerted activities..." 641 F.2d at 559.

asserts that under *Bio-Science Laboratories*, 209 NLRB 796 (1974), an employer is not required to follow provisions in a terminated collective-bargaining agreement.[15] *Bio-Science Laboratories* is inapplicable because it involved an attempt to apply a clause in an ongoing collective-bargaining agreement to a situation outside the scope of the agreement. Here the question is whether Randall's decision to remove a seniority privilege discriminated against striking employees. The fact that the privilege was written down in an agreement does not mean Randall could unilaterally eliminate it without a reason. Just as in *Moore Business Forms*, the alteration in shift assignment practices worked to the detriment of returning strikers. Randall's returning strikers were somewhat better off than those in *Moore Business Forms*, because they were not irrevocably locked into undesirable shifts, but nonetheless they were harmed through losing the right to use their seniority to move to preferred shifts upon request. The adverse effect on employee rights may only have been comparatively slight, but given Randall's failure to demonstrate a business purpose for its action,[16] the NLRB was justified in finding that Randall unlawfully ended its practice of shift preference.

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15. The striking employees in *Bio-Science Laboratories* contended they were entitled to be recalled in accordance with a provision in the collective-bargaining agreement governing recall from layoffs. Because of the strikers' seniority, application of the layoff provision would have entailed termination of permanent replacements, which the employer refused to do. The NLRB upheld the employer's position, pointing out that under *Mackay Radio*, an employer may not be forced to discharge permanent replacements.

16. Randall admits by implication that it offered no proof of a business purpose for eliminating shift preference. See Brief for Petitioner at 38. However, Randall argues that there was also no proof of harm to union activity, because no one offered evidence that employees in fact preferred one shift to another and because Randall reduced the number of shifts following the strike from three to two. Randall's argument is belied by the fact that the Union evinced enough concern about shift preference to include it in the expired bargaining agreement. Whether there were two or three shifts, it is only logical that at least some employees would have a preference among them. See also testimony of Gary Stevens, Tr. 435, 442-43 (employee desired to move from night to day shift and did so when opportunity arose).

F. *Insurance Coverage*

The NLRB determined that Randall illegally treated returning strikers as new employees not only for purposes of shift assignment, but also for insurance purposes, because the strikers' insurance coverage did not resume until 60 days after they returned to work.

Randall defends its delay in reinstituting insurance coverage on the ground that the terms of the insurance policy were mandatory and left the company no other choice.[17]

The NLRB again cited *Moore Business Forms, supra,* 574 F.2d at 841, to support its conclusion on the insurance issue. In *Moore Business Forms,* the strikers' qualification for insurance coverage turned on the employer's decision whether to treat them as new employees or not. Here, by contrast, the employer's characterization was not the determining factor. The insurance contract specifically enumerated what categories were exceptions to the "ceasing active work" standard, and strikers were not on the list. In order to follow the General Counsel's suggestion and certify to Aetna that the strikers were eligible for coverage (See Respondent's Brief at 30), Randall would have had to violate its contract with Aetna. Because Randall did not have the right to alter the terms of its insurance contract unilaterally, it had a legitimate and non-discriminatory business reason for requiring returning strikers to wait 60 days before insurance coverage resumed. We decline to enforce the Board's order on this issue.

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17. Randall's contract with Aetna Life & Casualty Company provided that any full-time permanent employee would be covered after the employee served a 60-day probationary period. However, coverage would halt and the employee would have to re-serve the probationary period if the employee ceased active work, defined as follows:

> Ceasing active work will be considered to be immediate termination of employment, except that if you are absent from active work because of sickness, injury, temporary layoff, or leave of absence, or on account of being pensioned or retired, employment may be deemed to continue for the purposes of some of the coverages up to the limits specified in the complete plan description.... General Counsel's Exhibit 60.

G. *The Stevens Incident*

The NLRB found that Randall's personnel manager wrongfully solicited Gary Stevens to abandon the strike by asking him if he would like to sign the sign-up list. This was the only point on which the Board disagreed with the ALJ, and we find the Board's position to be unsupported by the evidence.

Although the record shows that Stevens did not request to be approached about returning to work, the record also shows that the meeting was not initiated by Randall, and it came to an end as soon as Stevens indicated his intent to remain on strike. Because the meeting occurred at the behest of another employee, and because it was an isolated and non-coercive occurrence, we conclude that it did not constitute unlawful coercion under the Act. Accordingly, we deny enforcement of the portion of the Board's order relating to solicitation.

III.

This case presents several issues which require careful weighing of the relative burdens on the rights of employer and employee within the framework established by the Supreme Court. On most of the issues, including the transfer of permanent replacements into special-rated jobs in preference to reinstating strikers, the recall of permanent replacements from alleged leaves of absence, the transfer of security guards into production positions, and the disallowance of shift preference, we conclude that the Board correctly identified and considered the competing interests, and accordingly we grant enforcement.

On the other issues, however, we hold that the NLRB has either misapplied the law or made factual findings unsupported by the record. We deny enforcement with respect to those issues, including Randall's temporary reinstatement of the Turnages, the interruption of returning strikers' insurance coverage, and the alleged solicitation of an employee to abandon the strike.

Enforcement granted in part, denied in part.

Decision and Order of the National Labor Relations Board

Randall, Burkart/Randall, Division of Textron, Inc. *and* **United Automobile, Aerospace and Agricultural Implement Workers of America, and Local No. 1249.** Case 26-CA-7032.

July 21, 1981

DECISION AND ORDER

On August 14, 1980, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief to which Respondent filed a reply brief, and the Charging Party filed cross-exceptions and a supporting brief to which Respondent filed a separate reply brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,[1] as modified herein.

The Administrative Law Judge found that Respondent did not unlawfully solicit strikers Woodrow Robinson and Gary Stevens to return to work during the strike. We agree with the Administrative Law Judge's finding regarding employee Robinson. Contrary to the Administrative Law Judge, we find that Respondent violated Section 8(a)(1) by soliciting employee Stevens to abandon the strike.

The record indicates that, during the strike, Robinson wanted to return to work but did not want to go to the plant in order to sign Respondent's recall list because he feared retaliation against himself and his family. Instead, Robinson phoned Plant Manager Jack Melvin. Melvin sent

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1. In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

Personnel Director Mooneyhan to Robinson's home. After Mooneyhan explained the recall list's purpose, Robinson signed it.[2]

During the conversation between Robinson and Mooneyhan, employee Stevens, who lived across the street from Robinson, was standing in his yard. When he saw Stevens, Robinson suggested that Mooneyhan ask Stevens if he wished to return to work so that Stevens would not think Robinson signed the list or was helping Respondent. Mooneyhan then crossed the street and asked Stevens whether he wished to sign the recall list.

Unlike Robinson, therefore, it is apparent that Stevens did not seek out Respondent for purposes of signing the recall list. Nor did Stevens know that Mooneyhan came to his house at Robinson's suggestion. In these circumstances, we find that Respondent violated Section 8(a)(1) by soliciting Stevens to abandon the strike.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Randall, Burkart/Randall, Division of Textron, Inc., Blytheville, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(f) and reletter the following paragraph as 1(g):

"(f) Soliciting its employees to discontinue striking or other concerted activities on behalf of United Automobile, Aerospace and Agricultural Implement Workers of America, and Local No. 1249."

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2. Robinson returned to work the next week.

3. This isolated instance of unlawful solicitation does not otherwise taint Respondent's recall list. Stevens was only 1 of about 400 production and maintenance employees. And there is no evidence indicating that other employees did not sign the list voluntarily.

2. Substitute the attached Appendix A for that of the Administrative Law Judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to offer to qualified unreinstated strikers the opportunity to bid on special rated jobs in preference to strike replacements on the payroll.

WE WILL NOT refuse to accord to recalled economic strikers their right to shift preference.

WE WILL NOT transfer security guards to production jobs in preference to unreinstated economic strikers.

WE WILL NOT refuse to reinstate economic strikers in preference to hiring or recalling strike replacements.

WE WILL NOT require reinstated economic strikers to undergo waiting periods for resumption of their group life, accident, and medical insurance coverage.

WE WILL NOT solicit our employees to discontinue striking or other concerted activities on behalf of United Automobile, Aerospace and Agricultural Implement Workers of America, and Local No. 1249.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

WE WILL offer reinstatement and backpay, with interest, to any unreinstated strikers who were unlawfully denied an opportunity to bid upon special rated jobs because we preferred strike replacements then on the payroll.

WE WILL offer reinstatement and backpay, with interest, to any striker who was unlawfully denied reinstatement because we hired or recalled strike replacements to production jobs, or transferred security guards to production jobs following the termination of the strike on October 16, 1977.

WE WILL reinstate the practice of shift preference in the manner in which it existed prior to the strike which commenced on September 8, 1977.

WE WILL make whole all striking employees for any losses they may have suffered through lack of group insurance coverage subsequent to the date they returned to work, or would have returned to work, but for the unlawful cancellation of such insurance coverage because our employees went on strike.

Decision of the Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 26-CA-7032

RANDALL, BURKART/RANDALL
(Division of Textron, Inc.)

and

UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, AND LOCAL NO. 1249

DECISION

Statement of the Case

Robert Cohn, Administrative Law Judge: This proceeding, held pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein the Act), was heard before me at Blytheville, Arkansas, and Memphis, Tennessee, on various dates between November 13, 1978, and September 17, 1979, upon due notice.[1] The original charge in the matter was filed by United Automobile, Aerospace and Agricultural Implement Workers of America, and Local No. 1249 (herein the Union), on January 16, 1978, upon which counsel for the General Counsel, through the Regional Director for Region 26, issued a complaint and notice of hearing on March 1, 1978. This complaint was amended on several occasions before and during the hearing herein.

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1. Adjournments were taken primarily for the purpose of allowing counsel for the General Counsel to peruse and copy certain of the business records of Respondent; also, on May 22, 1979, counsel for the General Counsel filed a request for a special appeal to the Board from a ruling of mine, which was ruled upon by the Board on August 1, 1979. The hearing was closed by order dated February 19, 1980.

The principal issue to be resolved is whether Randall, Burkart/Randall, Division of Textron, Inc. (herein Respondent or the Company), violated Section 8(a)(3) and (1) of the Act with respect to its alleged failure to reinstate strikers promptly upon their unconditional offer following a strike at Respondent's Blytheville, Arkansas, plant in the fall of 1977. Also presented for resolution are several issues of alleged independent violations of Section 8(a)(1) of the Act by agents or supervisors of Respondent, as hereinafter detailed.

Following the close of the hearing, post-hearing briefs were filed by counsel for all parties, which have been carefully considered.

Upon the entire record in the case, including my observation of the demeanor of the witnesses,[2] I make the following:

FINDINGS AND CONCLUSIONS[3]

The Alleged Unfair Labor Practices

A. *Background*

At its Blytheville plant, Respondent is engaged in the manufacture of various types of automotive trim such as body side moldings, wheel openings, hubcaps, and headlight openings. The material utilized in such production is primarily stainless steel and aluminum. Respondent produces several hundred types of products annually, primarily for its customers who are the major automobile manufacturers.

The normal employee complement of production and maintenance employees in the plant numbers approximately

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2. Cf. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

3. There is no issue as to the jurisdiction of the National Labor Relations Board, or the status of the Union as a labor organization. The complaint alleges sufficient facts, which are admitted by answer, upon which I may, and do hereby, find that Respondent is engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. See also *Randall, Burkart/Randall, Division of Textron, Inc.*, 240 NLRB 263 (1979), of which judicial notice is taken.

400. These employees are distributed throughout the plant in various numbered departments such as large press, small press, anodize, shipping, receiving, and the like. It is important to note for the purpose of the issues in this case that while the production employees are distributed among the several departments, as noted, the rate of pay of the production workers is substantially the same. In this connection, the record shows that, while a particular classification of a production employee may be assigned to a certain department at any given time, such employee's skills may be equally adapted to—and he may be called upon to perform—similar functions in another department of the plant. Indeed, the record reflects that production employees have historically been moved throughout the plant as needed to perform production work. However, it should be equally noted that there are some production jobs in the plant which are denominated "special rated jobs" which carry a higher rate of pay, such as buffing, rolls, tool and die, maintenance, and inspection. Nevertheless, as in the case of a normal production employee, the record reflects that a special rated employee may perform substantially similar work for the same rate of pay in different departments.

Thus, it appears that Respondent does not run an assembly type operation where an employee performs a specific job in a specific place every day. Rather, as noted above, an employee who may be classified as a press operator, for example, might operate a press in one department one week while operating a different press in another department the following week because of a variance in orders received.

With respect to the manner and flow of production in Respondent's facility, it appears that the volume and types of such production are dictated primarily upon customer's "releases" which Respondent receives at least once per week, and sometimes more frequently. Such releases are orders for parts which, in turn, regulate and direct which particular machinery Respondent utilizes in order to produce the orders.

With respect to the volume of production, such volume is predicated primarily, of course, upon the customer's weekly

orders. However, Respondent also engages in some production for inventory purposes, particularly during an annual period when a collective-bargaining agreement is scheduled to terminate. During such years, the customers of Respondent require that Respondent build up an inventory of principal parts which would enable them to be supplied for a period of at least 30 days in the event of a work stoppage.

With respect to the level of the employee complement of production workers, the plant manager testified without contradiction that his principal objective was to operate the plant in the most efficient manner with the least number of employees. In furtherance of such objective, he testified that during the last week of each month the principal officials at the plant confer respecting projected sales figures and finished goods inventory, and project the amount of production needed and determine the number of employees required to fulfill production schedules. The actual assignment of employees throughout the plant is controlled by lower level supervision.

With respect to the representation by the Union of the production employees of Respondent, the record reflects that the Union, in fact, represented such employees for a number of years prior to the events giving rise to the issues in this case.[4] The last collective-bargaining agreement between Respondent and the Union was due to expire on September 1, 1977. Negotiations between the parties commenced during the summer of 1977, but no agreement was reached by September 1, and the parties agreed to extend the contract from September 1, to September 6, 1977. Agreement was still not reached by the parties on a contract by that time, and on September 8, 1977, the Union commenced an economic strike on that date in both units. The record reflects that, at the outset of the strike, all production and maintenance employees participated with the exception of approximately five janitors and one production employee.

4. The Union, in fact, bargained with Respondent with respect to two separate units: (1) a production and maintenance unit, and (2) a tool-and-die unit. However, the latter unit was much smaller than the former and is not directly involved in this proceeding.

B. *Events Transpiring During the Strike*

As noted, substantially all of the production and maintenance employees employed by Respondent on September 8, 1977, originally participated in the strike.[5] The strike continued until October 16, 1977, at which time the Union notified Respondent that it was willing to accept Respondent's last offer and end the strike effective October 16, 1977. The Union also applied unconditionally, on behalf of all strikers, for reinstatement to their old jobs, and submitted to Respondent a list containing the names of all strikers in order of their seniority for purposes of reinstatement. However, during the course of the strike, on or about September 19, in its personnel office, Respondent commenced the maintenance of a list of strikers who indicated a desire to return to work. There is no evidence that this list was promulgated or established for the purpose of soliciting strikers to return to work, but rather was utilized as a means to orderly record the strikers who came into the office and so indicated his or her desire to return to work. Accordingly, I find no violation of the statute by the establishment and maintenance of such a list by Respondent during the course of the strike.

The record reflects one instance of alleged unlawful solicitation of a striker to return to work during the course of the strike. This concerned employee Woodrow Robinson who did not desire to go to the plant for purposes of signing the aforesaid recall list for fear of retribution to himself and his family. Accordingly, Robinson telephoned Plant Manager Jack Melvin respecting his desire to return to work. Under the circumstances, Melvin directed Personnel Director Mooneyhan to go to Robinson's house for the purpose of allowing him to sign the list. According to Robinson's testimony at the hearing, Mooneyhan explained that the list was

5. There is no question but that the strike, which was called by the Union in an effort to enforce its economic demands, was from the inception an economic—as distinguished from an unfair labor practice—strike. One of the contentions of the General Counsel is that such strike was converted to an unfair labor practice strike during its existence; however, I find no substantial evidence in the record to sustain that contention.

one of strikers who had either returned to work or desired to return to work, and that if Robinson so returned, the latter would keep his seniority over the new drivers which Respondent had hired. Robinson signed the list and returned to work the following week.

The record reflects that another striking employee, Gary Stevens, lived across the street from Robinson and apparently was standing in his yard during the Robinson-Mooneyhan incident, described above. Robinson, in a pre-hearing affidavit, stated that he saw Stevens in his front yard and suggested that Mooneyhan go over to Steven's house and ask the latter if he wished to return to work—that this suggestion was made "so Stevens wouldn't think I signed the list or that I was helping the Company." Mooneyhan did, in fact, go across the street and ask Stevens whether the latter wished to sign a list to return to work. Stevens responded that he would "wait it out until the strike was over."

Thus, the evidence shows that the solicitation by Respondent's agent of two strikers to return to work during the strike was prompted by the request of one of the strikers; and that such occasion was the sole incident reflected by the record of such solicitation among several hundred strikers. Accordingly, I conclude and find that the General Counsel did not sustain the allegation in the complaint that Respondent unlawfully solicited strikers to abandon their concerted activities in violation of Section 8(a)(1) of the Act.

The record reflects that, during the course of the strike, Respondent hired some 422 employees as permanent replacements for strikers.[6] In addition, the record reflects that, commencing shortly after the strike began, strikers com-

6. Of course, all of these striker replacements were not hired at one time; some were employed to replace other striker replacements who did not report for work, or quit, or were discharged shortly after commencing employment.

menced returning to work with the Company.[7] Accordingly, when the strike terminated, the employee complement numbered approximately 360.

C. *The Procedure Respecting Reinstatement Following the End of the Strike and Other Events*

The evidence shows that, following the end of the strike on October 16, 1977, Respondent adopted and placed into effect the following procedure respecting the method of recalling and reinstating strikers to production jobs which were necessary to be filled either through a vacancy created by a departure of a striker replacement (or a striker who had returned to work), or an expansion of its work force.[8] Respondent would first offer the production job to a striker who had signed the first list maintained in the personnel office during the strike; after this list was exhausted, the Company would then offer that job to the first person on the seniority list submitted by the Union. With respect to a vacancy in a special rated job, above referred to, the Company would first seek to fill such vacancy from among its workers in the plant who possessed the necessary qualifications at the time the vacancy arose. If this were unsuccessful, the Company would then look to the first signup list in order to ascertain whether any person on that list had previously performed the special rated job; if unsuccessful there, the Company would then seek the most senior person on the union list who had performed the job prior to the strike. It is unrefuted that, following the end of the strike, the Company hired no new employees into positions held by strikers.

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7. By September 19, 1977, 29 strikers had voluntarily returned to work. Mooneyhan testified that, after the aforesaid list came into existence in the personnel office, strikers would be called pursuant to said list (in the event of a vacancy) prior to the employment of a striker replacement.

8. It should be noted that there was no strike settlement agreement entered into between the Company and the Union; however, the Company did agree that, when it recalled strikers pursuant to the Union's unconditional offer, they would be recalled according to their seniority.

It is one of the principal contentions of counsel for the General Counsel that, following the end of the strike, the Company wrongfully and unlawfully transferred striker replacements to other jobs in the plant, including special rated or "bid" jobs, which should have been first offered to strikers. Since this issue constitutes a cardinal one in the case, it seems appropriate to discuss and dispose of it at this juncture.

At the outset, it appears that there are several types of transfers involved which must be differentiated: (1) temporary transfers of similarly classified employees to other departments; (2) transfers of employees to another classification on a temporary basis not to exceed 10 working days; (3) permanent transfers of employees in special rated jobs which requires a posting procedure; and (4) permanent transfers of production workers to another classification which requires a posting procedure.[9]

It is clear from the unrefuted testimony of Respondent's officials that, due to the differing types of production orders which arise weekly (or more often), there is a need for Respondent frequently to transfer production employees from one department to another in order to care for such production schedules. Thus, in such cases, an employee, or employees, may be transferred from one department to another for a short period of time to work on a similiar machine in the latter department in order to satisfy the production requirement. It is a contention of counsel for the General Counsel that the necessity for such a transfer creates two "vacancies" for which Respondent should have recalled nonreinstated strikers; i.e., the "vacancy" which gave rise to the transfer, and the "vacancy" created by the departure of an employee to the department where the production was required. In the light of Respondent's past practice in this regard which is dictated by its particular production system, above described, and confirmed by the pertinent provisions of the collective-bargaining agreement, it is my view that no

9. The applicable provisions of the expired collective-bargaining agreement setting forth the rules and procedures governing these working conditions are attached hereto as "Appendix B." [Omitted from publication.]

"vacancy" within the meaning of *Laidlaw*[10] and its progeny existed in this category for which an unreinstated striker was required to have been recalled. Accordingly, this contention of counsel for the General Counsel is rejected.

Skipping, for the moment, to the above-described category, relating to bid or special rated jobs, such a situation requires a different conclusion in the light of the Board's Decision in the recent case of *MCC Pacific Valves, a unit of Mark Controls Corporation.*[11] In that case, as here, the facts showed that shortly after the strike ended, respondent posted jobs for bidding by employees then on the payroll including permanent strike replacements and reinstated strikers. At the time these jobs were posted, there remained a number of strikers who had not yet been reinstated and who were, in fact, qualified to perform the posted jobs. However, some posted jobs were offered to unreinstated strikers only if there were no successful bidders on those jobs from within the plant. The Administrative Law Judge held that the respondent in that case had not violated the Act by not offering initial job vacancies to strikers awaiting reinstatement. The Board disagreed, stating as follows:

> We do not agree with the Administrative Law Judge's conclusions in this regard. It is, of course, well settled that an economic striker is entitled to full reinstatement to his former job or to a substantially equivalent job upon an unconditional offer to return to work.[7] Although an employer has the right not to discharge those replacements to make room for returning strikers,[8] an employer must, when and if a job becomes available for which a striker is qualified, offer

7. See *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967); *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); and *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

8. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

10. *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

11. 244 NLRB 931 (1979).

that job to an economic striker. An employer may refuse to reinstate a striker only if it shows substantial and legitimate business reasons for doing so.

Here, as in *MCC Pacific Valves*, it is clear "that at least some job vacancies occurred because of the departure of strike replacements from those jobs...."[12] In opening those jobs for bidding and in filling them, Respondent was *not* entitled to prefer strike replacements then on the payroll to qualified strikers awaiting reinstatement."[13]

Respondent, in its brief, seeks to distinguish *MCC Pacific Valves* on the ground that:

> There is no evidence in the record to suggest that the Company transferred employees on its active workforce to fill vacancies created by the *departure* from the *plant* of permanent replacements or reinstated strikers; nor is there any evidence to suggest that the Company discriminatorily manipulated its reinstatement procedure in order to by-pass strikers when it needed to add to its workforce; nor is there any evidence that the Company ever took any action to discriminatorily deny strikers reinstatement by terminating their *Laidlaw* rights and cutting off their seniority; nor is there any evidence to rebut the Company's documentary and testimonial proof that these transfers were made for sound business reasons. To the contrary, the evidence establishes that the Company did not deviate from its recall procedure, a procedure which was designed and implemented to return strikers to their prestrike jobs as the need for additional employees arose.

I cannot agree with the foregoing contentions with respect to the special rated jobs. Whether the special rated job opening arose as a result of a departure from the plant of a permanent replacement or a reinstated striker, or whether it arose from a need by Respondent to add to its workforce,

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12. See quotation from brief of counsel for the General Counsel, *infra*.

13. *MCC Pacific Valves*, 244 NLRB at 933.

the fact remains that a job opening arose for which a striker was qualified and available, and that he was admittedly denied the opportunity even to bid for such job without a showing by Respondent of a substantial and legitimate business reason therefor. As the General Counsel shows in his post-hearing brief:

> Thus, between the end of the strike and the end of calendar 1977, a total of 40 replacements departed their jobs. During the same period of time, Respondent transferred a total of 59 striker replacements to different jobs (G.C. Exh. 29(b)). Of these 59 transfers, 31 involved the transfer of striker replacements into bid, or special rated jobs (G.C. Exh. 29(b)), and in 13 of these 31 instances, striker replacements were upgraded from production jobs to special-rated or bid jobs (G.C. Exh. 29(b)).

Thus, in the light of the Board's holding in *MCC Pacific Valves*, it is my view, and I therefore find, that Respondent violated Section 8(a)(1) and (3) of the Act when, with respect to special rated or bid jobs, Respondent filled such jobs by first offering them to employees on the existing payroll rather than to qualified strikers awaiting reinstatement.

Returning to the category respecting permanent transfers not involving special rated jobs, Respondent relies on *Kennedy & Cohen of Georgia, Inc.*,[14] in support of its position that it was not unlawful to transfer an employee presently on the payroll to a permanent job rather than to recall an unreinstated striker.

In *Kennedy & Cohen*, the striker (who had previously been actively employed as a salesmen) made an unconditional offer to return to work in June. The following month, respondent transferred a former supervisor (Sharp) to a salesman's position. The Board held:

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14. 218 NLRB 1175 (1975).

> The Administrative Law Judge concluded that Sharp was a new hire in July and therefore striker Keenum was entitled to the position which he filled. In view of Respondent's uncontradicted evidence, it appears that Sharp was not a new hire, but an old employee who was shifted from a supervisory position to a nonsupervisory sales position for a nondiscriminatory reason. Respondent was not required to prefer a striker to Sharp in making the transfer. [218 NLRB at 1176.]

Although the *Kennedy & Cohen* case was not referred to by the Board in *MCC Pacific Valves*, it seems to have been overruled at least to the extent that, in such situations, respondent employers are now required to prefer unreinstated strikers to employees then on the payroll unless the employer can show "substantial and legitimate business reasons for doing so."[15] [*sic*]

The record shows that, under the prior contract, Respondent was free to make interdepartmental moves of similarly rated employees when needed so long as least senior employees were those affected. (Art. VII, sec. 16.) This provision was doubtlessly inserted in the contract to enable the Company to transfer employees freely within the plant to similar job functions existing in the various departments. The record shows that this policy continued during and after the strike. Thus, no discriminatory motive may be gleaned from a change in means or method of production and, unlike the situation in *MCC Pacific Valves* where the Board discredited the company's business reasons for its conduct,[16] the Company here made available and/or produced documen-

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15. A *caveat* to this rule may appear where the employee on the payroll is a reinstated striker, as discussed *infra*.

16. 244 NLRB at 934: "However, these asserted reasons, particularly with respect to the production imbalance, are incredibly general and are unsupported by either specific facts or documentary evidence, due in part, perhaps, to the fact that the strike lasted only 1 month."

tary evidence in support of its position.[17] Moreover, there was no such evidence as existed in *Laher Spring & Electric Car Corp.*, 192 NLRB 464 (1971), of a "scheme" to avoid reinstatement of strikers.

There is no evidence that, with respect to a transfer of a production employee to another classification for a period exceeding 10 consecutive days, the Company made any attempt to comply with the bid procedure prescribed in article VII, section 14, of the previous contract. This is consistent with its failure to apply the shift preference section (art. VII, sec. 8) discussed *infra*, and reflects a general policy on the part of Respondent not to honor the provisions of the expired contract absent express agreement to do so. There would seem to be some merit in such a position in the light of the Board's language in *Bio-Science Laboratories*, 209 NLRB 796 (1974):

> The Administrative Law Judge found, and we agree, that under *The Laidlaw Corporation* unreinstated economic strikers do not have the statutory right to recall in accordance with a collective-bargaining agreement provision covering recall from layoffs where the parties have not agreed to the application of such a clause to the reinstatement of economic strikers.

Moreover, I note that, unlike the situation in *MCC Pacific Valves* and some other similar situations,[18] Respondent here executed no strike settlement agreement or new contract with the Union following the termination of the strike. Indeed, a decertification petition was filed and an election

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17. Thus, Company records reflect that approximately 75 percent of all employees were transferred at least once during the course of their employment; and that approximately 40 percent of the strikers reinstated after the strike (until 10-1-78) were transferred at least once. (The above figures were taken from G.C. Exh. 36, which was rejected for the purpose offered, but there is no question as to the authenticity of the documents (personnel cards).) The records further show that some of the transfers involved merely a change from one production job to another without a significant change in rate of pay while other transfers involved a change to a higher classification with commensurate higher pay scales.

18. See, e.g., *United Aircraft Corporation (Pratt & Whitney Division)*, 192 NLRB 382 (1971).

held. (See discussion *infra.*)

Finally, the record reflects, as previously noted, a substantial percentage of reinstated strikers were transferred along with the strike replacements into new positions. Such entanglement seriously negates, in my view, a discriminatory purpose, and seems to illustrate that situation envisaged by the Board in *MCC Pacific Valves:*

> We recognize that not every job opening is one that an unreinstated striker, though qualified, is *entitled* to fill. There may be circumstances, for example, in which the rights of unreinstated strikers may conflict with the rights of those strikers who *have* been reinstated or even with the rights of permanent strike replacements. However, we find it unnecessary under the circumstances of this case to reach and pass on these issues. [244 NLRB 931, 934, fn. 15.]

Thus, it is entirely conceivable that a striker, recalled to a "substantially equivalent job," desires to be transferred to his prestrike job, and the respondent is willing to do so, but is prevented therefrom because there are still some unreinstated strikers awaiting recall who are qualified for his position. Upon what theory could respondent be held to be in violation of Section 8(a)(3) and (1) by transferring the returned striker rather than recalling an unreinstated striker?

In view of all of the foregoing, I conclude and find that no violation of Section 8(a)(3) and (1) occurred by Respondent's post-strike transferring of production employees within the plant rather than recalling unreinstated strikers to such jobs.

D. *The Alleged Discriminatory Refusal To Recall Strikers Immediately Upon Their Unconditional Request for Reinstatement*

As previously noted, the normal complement of employees in the unit prior to the strike was approximately 400. Although Respondent hired in excess of 400 persons as permanent replacements during the course of the strike,

the record reflects that there were only approximately 360 employees in the unit at the end of the strike.[19] Counsel for the General Counsel argues that Respondent deliberately refused to fill job vacancies through the recall of strikers at that time. Respondent claims that it had ample business justification for not immediately recalling a large number of strikers at that time.

The principal argument of Respondent is that, as previously set forth, it was required by its customers, during an annual period which encompassed the termination of a collective-bargaining agreement, to build up an inventory of finished goods to a level which would carry it through at least a 30-day period should a work stoppage occur. Because of such inventory buildup the production requirements of Respondent following the strike were such as to not require the hiring of a substantial number of additional employees until February 1978.[20]

In light of the foregoing evidence of business justification, which is unrefuted on the record, I find that Respondent met its burden of establishing the defense that a substantial number of unreinstated strikers was not required for its production immediately upon termination of the strike, and strikers were recalled as needed when production schedules rose following the commencement of calendar year 1978.[21]

19. The record shows that many of the permanent replacements hired either did not ever report to work or quit their employment shortly thereafter.

20. For comparison purposes, the record reflects that, in August 1976, Respondent had a finished goods inventory of approximately 9.5 units; in August 1977, such inventory reached a level of almost 19.5 units; at the end of the strike in middle October, it had declined to approximately 13.5 units; and, by January 1978, it had reached a level of slightly over 8 units.

21. *Pillows of California*, 207 NLRB 369 (1973). *Laher Spring & Electric Car Corp., supra*, relied on by counsel for the General Counsel, is distinguishable. In that case, the Board found that respondent deliberately failed and refused to recall strikers since a strike settlement agreement entered into between the company and the union provided that the strikers would lose all rights to reinstatement and be treated as new employee applicants if they were not reinstated within 6 months following the termination of the strike. Moreover, the respondent failed to produce records of unfilled and filled orders which it possessed which created an adverse inference respecting the true state of affairs regarding such subject matter. In the instant case, the hearing was adjourned *sine die* to allow inspection of the Company's business records in this regard, and, when the hearing reconvened, counsel for the General Counsel did not present any evidence in rebuttal to the Company's evidence of business justification.

E. *The Hiring of 13 Nonstrikers as New Employees in December*

An issue is presented respecting the recall by the Company of some 13 strike replacements hired during the strike who thereafter ceased, for various reasons, to be active employees of the Company, but were thereafter recalled to work by Personnel Manager Mooneyhan on or about December 5, 1977. It is the contention of Respondent that these 13 persons (who are named in G.C. Exh. 46) were on "leaves of absence" and therefore the recall of them to active employment in December did not constitute a hiring of a new employee. It is the contention of counsel for the General Counsel that these persons left the employment of Respondent during the strike, and that their recall in December constituted a violation of the Act since, under the *Laidlaw* doctrine, an unreinstated striker should have been recalled. I agree with counsel for the General Counsel.

Personnel Director Mooneyhan testified that he discovered in December that there were employees who had not picked up their payroll checks, and that there was no reason on these employees' records of why they had left their employment; that no supervisor had notified the personnel department that they had been fired; and that he had not fired them or laid them off—"So, we didn't have any idea what the status of those people were [sic]." Mooneyhan decided to telephone them to ascertain their status, and testified that he called the persons individually; that they gave various reasons for not being at work such as illness, nervous breakdown, etc.; that he (Mooneyhan) told the persons to be at work the following Monday or Tuesday or he would "write them off." When the persons returned to work, Mooneyhan treated their absences as a "leave of absence," and made such a notation on their personnel status cards.

Gerald Hopkins was the only 1 of the 13 who testified at the hearing. He stated that he commenced employment with Respondent during the strike, as a painter, but that after working at the plant for approximately 2 weeks, he called in one Monday morning and told a lady in the office that he

was sick and could not come to work that day. The following day, he reported to work and explained to his supervisor what had happened the previous day, but the supervisor told Hopkins that he could not use Hopkins any more. Hopkins assumed that he had been discharged and did not return to the plant. Hopkins testified that, about a month later, Mooneyhan telephoned him at his home and said that there was an opening on the night shift and asked Hopkins whether he wanted to work. Hopkins replied affirmatively, and the record shows that he returned to active employment with Respondent on December 5, 1977, in the packing department.

It is apparent from the foregoing that Hopkins never requested nor received from Respondent permission for a "leave of absence" as that term is normally utilized in labor relations parlance. The uncontroverted evidence is that he was terminated, although the supervisor apparently neglected to notify the personnel department of such action.[22] Moreover, according to Hopkins' testimony, Mooneyhan did not even make inquiry as to the circumstances under which Hopkins left his employment, but simply inquired whether Hopkins wanted to return to work, and he answered yes.

In view of all the foregoing circumstances, I am convinced, and therefore find that none of the named 13 strike replacements, including Hopkins, were ever, in fact, granted "leave of absence" by Respondent but left Respondent's employment for various reasons including discharge or voluntarily quitting; that Respondent, however, apparently preferring to recall strike replacements rather than unreinstated strikers to employment in December, utilized the label "leave of absence" so as to create the impression that the recall of the 13 was not as new employees. Accordingly, I conclude and find that the failure to recall 13 unreinstated strikers on or about December 5, 1977, to fulfill those jobs constituted

22. Mooneyhan testified that, as might be expected in the circumstances, there was a substantial amount of confusion in the personnel office during the course of the strike.

a violation of Section 8(a)(1) and (3) of the Act.[23]

F. *The Transfer of Five Employees From the Security Force Into Production Jobs*

The record reflects that, during the strike, Respondent employed another company to provide security about the Blytheville plant. However, Respondent found this arrangement to be too expensive, and set up its own security force consisting of approximately 12 employees. Subsequently, around the first of the year, 1978, Respondent reduced the security force to seven employees. The remaining five employees were transferred into production jobs in the plant. Counsel for the General Counsel contends that Respondent should have recalled five unreinstated strikers to fill the production jobs into which the security guards were transferred; Respondent, citing the Board's decision in *Kennedy & Cohen of Georgia, Inc., supra,* urges that Respondent was not required to prefer a striker over its then-current employees.

The pertinent facts in *Kennedy & Cohen* and the Board's resolution of them respecting this issue have been referred to, *supra.* Also, reference has been made to the later case, *MCC Pacific Valves, supra* at 933, where the Board stated that: "An employer may refuse to reinstate a striker only if it shows substantial and legitimate business reasons for doing so." I am of the view that Respondent has not sustained its burden in this regard.

Thus, unlike the situation where Respondent hired a permanent strike replacement for a production job, and committed itself to retain such person as long as the latter per-

23. The same result would be reached with respect to Louis E. Turnage and Cheryl I. Turnage (man and wife) who were strike replacements hired on September 19, 1977. Both worked in the plant until December 14 and 8, respectively, when they quit in order to move to California. About a week later, they came into Mooneyhan's office and advised that they were unable to leave because of inability to sell their house at that time, and wanted to return to work. Mooneyhan testified that he checked with his production supervisors who advised that they could "use them," whereupon Mooneyhan rehired them, and they worked another week or two prior to selling their house and leaving for California. Clearly, a vacancy arose for which two unreinstated strikers should have been recalled in that case.

formed such job proficiently, there is no evidence that Respondent made any such commitment to the security guards. Rather, Respondent relies only on its "good faith" in transferring them. In the light of the Board's holding in *MCC Pacific Valves,* I am of the view that this is not sufficent, and accordingly find and conclude that by transferring the guards into production jobs in January 1978, rather than recalling unreinstated strikers, Respondent violated Section 8(a)(3) and (1) of the Act.

G. *The Shift Preference Issue*

The complaint, as amended, alleges that since on or about January 1, 1978, Respondent has refused to permit its employees who engaged in the strike to use seniority to transfer to preferred shifts. The record discloses that there was a provision in the collective-bargaining agreement between Respondent and the Union prior to the strike, which provided for shift preference based on seniority. However, the contract expired on September 8, 1977, and there was no agreement between Respondent and the Union subsequently respecting shift preference. Accordingly, the Company concedes that its policy subsequent to the strike did not permit employees to exercise seniority to obtain shift preference. Counsel for the General Counsel, relying on *Moore Business Forms, Inc.,*[24] argues that Respondent thereby violated Section 8(a)(3) and (1) of the Act since it treated the strikers as new employees with respect to the assignment of departments and shifts. Respondent takes the position that, since the collective-bargaining agreement terminated, no policy existed with regard to shift preference and therefore, in the absence of any union animus or preferential treatment to permanent replacements in regard to shift changes, no violation occurred.[25]

In *Bio-Science Laboratories,* there was an economic strike during which the company and the union negotiated

24. 224 NLRB 393 (1976), enfd. in pertinent part 574 F.2d 835 (5th Cir. 1978).

25. In support of its contention, Respondent cited *Bio-Science Laboratories,* 209 NLRB 796.

with respect to the issue of the reinstatement of strikers. During such negotiations, the union took the position that the striker replacements should be terminated and the strikers reinstated to their former jobs, but the respondent refused to do so. After the strike was called off, the union urged the company to treat the strikers as laid-off employees and to recall them in accordance with a collective-bargaining agreement provision regarding recall from layoffs. The company refused that proposal and finally implemented its own reinstatement system. The Board found that, since the parties had not agreed to the application of the recall provision respecting the reinstatement of economic strikers, such unreinstated strikers did not have the statutory right to recall in accordance with such provision under the *Laidlaw* doctrine.

In *Moore Business Forms, supra*, the company had operated pursuant to a rotating shift system of employment (employees changed shifts weekly). After the commencement of an economic strike, respondent commenced operations pursuant to a fixed shift system of employment which, it claimed, was required in order to train replacements during the strike. It is apparent that the necessary effect of such change in operations "insured that virtually all returning strikers were permanently assigned to the less desirable second and third shifts. The strikers who came back to work early, the employees who did not strike, and the workers hired to replace strikers were permanently assigned to the more desirable first shift. The Board found that the institution of fixed shifts, over the opposition of the union, operated to discriminate between strikers and non-strikers and had a destructive impact upon the strike.[26] The Administrative Law Judge, affirmed by the Board, found that the institution of the fixed shifts was comparable to the award of superseniority considered by the Supreme Court in *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). He went on to find:

> The institution of fixed shifts, like the superseniority, operated to discriminate between strikers and

26. *N.L.R.B. v. Moore Business Forms, Inc., supra* at 840-841.

> nonstrikers, both during and after the strike, and had a destructive impact upon the strike and union activity. As such, it carried its own indicia of intent and, as there was no overriding business justification for continuing the fixed shifts beyond the hiring and training period for strike replacements, the business purpose asserted by Respondent was insufficient to insulate the change from the reach of Section 8(a)(1) and (3) of the Act. [224 NLRB at 407-408.]

Since Respondent's conduct in this case served as an inducement to strikers to abandon the strike early in order to avoid assignment to the less desirable second and third shift which had the necessary effect of "weakening the union's strike effort" (*N.L.R.B. v. Moore Business Forms, Inc., supra* at 841), the change in policy from acknowledging shift preference based on seniority to one that did not had a destructive impact upon the strike and union activity" (*Moore Business Forms, Inc.*, 224 NLRB at 407-408). As the court concluded:

> In the absence of a showing of an "overriding business purpose justifying the invasion of union rights," *N.L.R.B. v. Erie Resistor Corp., supra,* 373 U.S. at 231... the company's institution of fixed shifts violated Section 8(a)(1) and (3) of the Act. [574 F.2d at 841.]

Here, as in *Moore,* I find no "overriding business purpose justifying the invasion of union rights" in altering the shift preference policy previously existing; accordingly, I find that, by unilaterally nullifying such policy, Respondent violated Section 8(a)(1) and (3) of the Act.

H. *The Medical and Life Insurance Issue*

For a period of time prior to the events giving rise to the issues in this case, Respondent maintained a noncontributory group life, accident, and medical insurance plan, under contract with Aetna Life and Casualty Company, which administered the plan. All employees of Respondent in the unit were covered under the plan; however, the plan

provided that such coverage would cease at the end of any month when an employee's employment terminated or if he ceased to be a member of a class eligible for coverage. The plan provided as follows respecting the ceasing by an employee of active work:

> Ceasing active work will be considered to be immediate termination of employment, except that if you are absent from active work because of sickness, injury, temporary layoff, or leave of absence, or on account of being pensioned or retired, employment may be deemed to continue for the purposes of some of the coverages up to the limits specified in the complete plan description on file with your employer.[27]

If an employee does not come within any of the foregoing exceptions, he loses coverage under the plan for a period of 60 days after he returns to work.[28]

As applied to the facts herein, it will be recalled that the strike commenced September 8, 1977. Strikers who did not return to work until after October 1, 1977, were not covered under the plan until "the first day of the calendar month following completion of 60 days of service." (G.C. Exh. 60.) Thus strikers were treated differently under the plan from employees who ceased active work pursuant to other exceptions to the rule enumerated above.

Respondent seeks to escape any responsibility or liability on this issue on the ground that the administration of the plan was through Aetna Company, the Respondent had no right unilaterally to change any provision of the plan. Moreover, argues the Company, strikers were treated no differently from permanent replacments under the eligibility provision of the plan.

In my view, the resolution of this issue is controlled, like the shift preference issue discussed above, by the

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27. G.C. Exh. 60.

28. This is assuming that the individual employee in such circumstances did not exercise a right to convert to an individual policy. However, none of the strikers herein converted to an individual policy.

decision of the Board in *Moore Business Forms, supra.* There, the strikers were faced with a 90-day delay in the resumption of insurance coverage upon their return to work, and were therefore, for that period of time, treated as new employees with regard to their health insurance. The Administrative Law Judge, affirmed by the Board, ruled that such conduct by respondent, even absent an antiunion motivation, fell within the "inherently destructive category" employee benefits which the Board might find to constitute an unfair labor practice even if the employer introduced evidence that the conduct was motivated by business considerations (citing *N.L.R.B. v. Great Dane Trailer, Inc.*, 388 U.S. at 34; *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. at 228).[29]

The court of appeals, enforcing the Board's Order in this regard, stated:

> The company's action of paying medical benefits for non-striking employees while denying, for 90 days, the same benefit to employees who had participated in a strike had a discouraging effect on both present and future concerted activities. As with the institution of fixed shifts, we find this company action to be inherently destructive of employee interests carrying its own indicia of intent. Moore had the burden of explaining or justifying its actions. *N.L.R.B. v. Erie Resistor Corp., supra.* Without such an explanation by Moore that a legitimate business end was served by the waiting period requirement, the company's action constituted an unfair labor practice. [574 F.2d at 842.]

Accordingly, in the absence of substantial evidence that a legitimate business end was served by the waiting period requirement, I find that, by requiring the strikers who returned to work following the end of the strike to undergo a waiting period for the resumption of their insurance coverage, Respondent violated Section 8(a)(3) and (1) of the Act.

29. 224 NLRB at 407-408, *supra.*

I. *Additional Allegations of Independent 8(a)1) Violations*

The record reflects that, shortly after the end of the strike, on October 21, 1977, a petition was filed with the Board which stated that "a substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative"[30] Thereafter, on November 16, 1977, the Board conducted an election which the Union won. Subsequently, Respondent filed timely objections to the election, which were eventually overruled. The complaint herein contains several allegations of violations of the Act which arose, apparently, in connection with, or as a consequence of, that proceeding.

1. James L. Dixon

Employee James L. Dixon testified that, on the day before the election, he received a telephone call from Plant Manager Jack Melvin in which the latter said, "James, if the union goes out, I'll call you back to work in a few days." Dixon assertedly replied, "Well, Jack, I don't know which way I'm going to vote. I ain't gonna tell nobody which way I'm going to vote." Melvin responded (according to Dixon), "Well, I thought you were a better man than that." Melvin denied that he initiated any calls to Dixon, but admitted having two telephone conversations with Dixon (misspelled Dickson in some places in the transcript) around this period of time, which Dixon initiated. In the first conversation, Dixon asked Melvin did the latter know when he would be called back to work, and Melvin responded that he would be called back when the Company reached his name on the seniority list, but that Melvin could not give Dixon any idea as to when that would be. About a week or 10 days later, Dixon telephoned Melvin again (according to Melvin's testimony) and in that conversation Dixon stated that some people had told him (Dixon) that Melvin was trying to reach him. Melvin denied the correctness of that assertion, and that was all there was to the conversation.

30. Case 26-RD-381.

After careful consideration of the inherent probabilities surrounding the situation, along with the demeanor of the witnesses, I have concluded that Melvin's version of the events should be credited. It is significant, in my view, that this is the only incident (out of approximately 400 unit employees) of an alleged request by Melvin of an employee to vote against the Union in the upcoming election. No reason appears from the record as to why Dixon should have been picked by Melvin for such an alleged telephone call. Moreover, Melvin's version is more consistent with his role in the process respecting the recall of strikers and the manner in which that process operated. That is to say, the actual recall of named strikers was performed by a lower level of supervision, and was there for all to see. If Dixon, or any other striker, was recalled out of turn, everyone concerned would have been apprised of the matter and it would have been a subject of investigation.

In view of all of the foregoing circumstances, I will recommend that this allegation of the complaint be dismissed.

2. Diane Malone

Employee Diane Malone was a striker who had not been recalled to work in November 1977. She testified that, approximately 2 weeks after the decertification election on November 16, 1977, she was at a local bowling alley where her son was engaged in bowling. While there, she had a conversation with Plant Manager Jack Melvin, who also happened to be in the bowling alley. No other person was persent during the conversation. According to the testimony of Malone, Melvin asked if she would "get up a petition against the Union." She responded that she would if he, in turn, would put her name on a list to be called back to work ahead of other strikers. Again, according to Malone's testimony, Melvin first objected, but then agreed with her proposal. She proceeded to draw up and circulate such a petition and, according to her testimony, persuaded approximately five other strikers to sign it. She testified that she gave it back to Melvin at the bowling alley the following Monday, according to a prearranged schedule, but that no conversation occurred at that time.

Melvin acknowledged that, on one occasion, he had a conversation with Malone at the bowling alley where his son also bowls; that the conversation consisted only of Malone's approaching him to ask if he would put her name on the unconditional return to work list (i.e., the first list), and that he advised that he could not comply with her request.

There was no third party present at the conversation between Melvin and Malone.

After careful consideration of the factors surrounding this incident, I am unable to credit Malone's version. In the first place, it seems highly unlikely that Melvin would ask her to promulgate another petition to decertify the Union at a time when the Company's objections to the election were still pending. Moreover, there was no corroboration of the signing of any such petition by any other employee-striker. Under all the circumstances, I shall therefore recommend that this allegation of the complaint be dismissed.

3. Alleged interference with employees' Section 7 rights by the Company's attorney

There is basically no dispute as to the facts giving rise to this issue. As previously noted, following the decertification election on November 16, 1977, Respondent filed objections to the election. Subsequently, the Board ordered a hearing on these objections, and an investigator of the Board took some affidavits from employees of Respondent pursuant thereto.[31] The Company's attorney requested the Board's investigator to make a request of the employees whose affidavits were taken whether the latter had any objection to having a copy furnished to the Company. However, the Board's investigator never did make such a request of the employees. This fact was later learned by the Company's attorney, whereupon, on April 13, 1978, he went to the Blytheville plant and talked to each of the employees

31. The affidavits were taken in the Company's offices in Blytheville. The names of the employees from whom the affidavits were taken were apparently supplied to the Board's investigator by Respondent's attorney.

previously interviewed by the Board's investigator.[32] The employees were called individually to the personnel office by a personnel clerk. Waiting in the office were Company Attorney Hawkins and then Personnel Manager Harry Burge. Each employee was first advised that their attendance was not mandatory. Hawkins then advised the employees of their rights enunciated by the Board in *Johnnie's Poultry Co.*,[33] to wit: That the purpose of the questioning was to enable Hawkins to prepare for the hearing on objections, that he was not interested in their union proclivities, and that no conditions were attached to them talking to him, and no promises were made and no threats to their jobs, or otherwise, were issued. After that, he asked if they had given the Board investigator an affidavit (yes) and did they receive a copy of said affidavit (no). Hawkins then asked if they would like to have a copy of their affidavit (yes), and if they had any objection to the NLRB giving him a copy of their affidavit prior to the hearing. If they said no, he asked them to sign the following letter addressed to the Regional Director of the NLRB in Memphis, Tennessee:

> I hereby request that you send me a copy of my affidavit taken by Board Agent Jack Blankenship during his investigation of the Employer's Objections and that, upon presentation of this letter, you give the Company's attorney, Michael W. Hawkins, a copy of my affidavit.
>
> I have been fully advised of my rights and realize that I am under absolutely no obligation to furnish the Company a copy of my affidavit.

To the knowledge of Respondent's attorney, the employees never did get copies of their affidavits.

Citing *Daybreak Lodge Nursing and Convalescent Home, Inc.*, 230 NLRB 800 (1977), counsel for the General

32. The great majority of these employees had previously been interviewed by Company Attorney Hawkins who had taken statements from them to support the Company's objections to the election.

33. 146 NLRB 770 (1964).

Counsel argues that the conduct of Respondent's attorney, cited above, constituted interference, restraint, and coercion of employees' Section 7 rights in violation of Section 8(a)(1) of the Act. In that case, the Board affirmed the findings and conclusions of an Administrative Law Judge who found, in the circumstances of that case, a violation of the Act. In so finding, he noted:

> The Board's latest pronouncement in this area seems to indicate that it will consider whether such conduct [an employer's request for affidavits given by employees to Board agents] is unlawful in the circumstances of each case (*Martin A. Gleason, Inc.*, 215 NLRB 340 (1974), enforcement denied 534 F.2d 466 (2d Cir. 1976)). [230 NLRB at 803-804.]

In the *Gleason* case, a three-member panel of the Board (then Chairman Miller dissenting) found an employer's request for statements "in the context of other serious unfair labor practices...may be interpreted by the affected employees as an order with the consequent invasion of their Section 7 rights." The majority went on to point out that the *Robertshaw Controls* case[34] relied on by the dissent involved a request for statements "in the context of very minor unfair labor practices, involving a small number of employees, and that there was no wholesale investigation by the Board of antiunion activities on the part of the Company."

Placing the facts in the instant case against the principles enunciated by the foregong authorities, I conclude, and therefore find, that no violation of the Act occurred respecting the requests of Respondent's attorney for the employees' affidavits. Like the court of appeals in *Robertshaw Controls*,[35] I am persuaded by the reasoning of the trial examiner (affirmed by the Board) in *Atlantic & Pacific Tea Company*, 138 NLRB 325, 334-335 (1962):

---

34. *Robertshaw Controls Company, Lux Time Division*, 483 F.2d 762 (4th Cir. 1973).

35. *Id.* at 769.

But the issue here is confined to whether or not Respondent's conduct in obtaining copies of these affidavits was in violation of Section 8(a)(1) of the Act. I am constrained to find that it was not. The evidence shows that Smith but *requested* the employees to obtain copies of their affidavits for the purposes indicated. He did not, as the General Counsel alleges, demand that they be produced. In the absence of any threats, harassment, or undue persuasion, I am compelled to find that Smith's conduct in this regard was not in violation of Section 8(a)(1) of the Act.

Based upon the foregoing, I shall recommend that this allegation of the complaint be dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to offer unreinstated strikers the opportunity to bid on special rated jobs in preference to strike replacements then on the payroll, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By failing and refusing to accord recalled economic strikers their shift preference according to their seniority, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By discriminating against recalled economic strikers by requiring them to undergo waiting periods for the resumption of their group life, accident, and medical insurance plan, Respondent violated Section 8(a)(1) and (3) of the Act.

6. Respondent violated Section 8(a)(1) and (3) of the Act when, following the end of the strike, it hired or recalled 13 named strike replacements from so-called leaves of absence rather than recall unreinstated strikers to those jobs.

7. Respondent violated Section 8(a)(1) and (3) when, following the end of the strike, it hired or recalled two strike replacements who had quit their employment, rather than recalling unreinstated strikers to those jobs.

8. Respondent violated Section 8(a)(1) and (3) of the Act when, following the termination of the strike, it transferred into production jobs five security guards rather than recall reinstated strikers to those jobs.

9. Respondent has not, except as specifically found above, violated the Act as alleged in the complaint, as amended.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as Respondent has failed to reinstate strikers in a timely fashion because of the unfair labor practices described above, it will be recommended that Respondent offer reinstatement to those strikers who were not reinstated as a consequence of those unfair labor practices (to the extent that it has not already done so), and make all strikers whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them, such payment to be made in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[36]

It having been found that Respondent unlawfully terminated its shift preference policy, it will be recommended that it be required to reinstitute such policy and implement it to all recalled strikers where appropriate.

36. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

It having been found that Respondent unlawfully required strikers who returned to work to undergo a 60-day waiting period as a prerequisite for insurance coverage pursuant to Respondent's group life, accident, and medical plan, it will be recommended that strikers be made whole for any losses they may have suffered as a result thereof, in the manner set forth above.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[37]

The Respondent, Randall, Burkart/Randall, Division of Textron, Inc., Blytheville, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to offer to qualified unreinstated strikers the opportunity to bid on special rated jobs in preference to strike replacements on the payroll.

(b) Refusing to accord recalled economic strikers their right to shift preference.

(c) Transferring security guards to production jobs in preference to unreinstated economic strikers.

(d) Hiring or recalling strike replacements, following the strike, in preference to unreinstated economic strikers.

(e) Requiring reinstated economic strikers to undergo waiting periods for the resumption of their group life, accident, and medical insurance coverage.

37. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer reinstatement and backpay to any unreinstated strikers who, at the compliance stage of this proceeding, are discovered to have been denied an opportunity to bid upon special rated jobs, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Offer reinstatement and backpay to strikers who were unlawfully denied reinstatement because Respondent hired or recalled strike replacements to production jobs, or transferred security guards to production jobs following the termination of the strike on October 16, 1977.

(c) Reinstate the practice of shift preference by seniority.

(d) Make whole all striking employees for any losses they may have suffered through lack of group insurance coverage subsequent to the date they returned to work, or would have returned to work, but for Respondent's unfair labor practices, in accordance with the provisions of the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its plant in Blytheville, Arkansas, copies of the attached notice marked "Appendix."[38] Copies of said notice, on forms provided by the Regional Director for Region

38. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

26, after beng duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the said Regional Director in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Judgment of the Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RANDALL, DIVISION OF TEXTRON, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 81-1831

JUDGMENT

Before: ARNOLD, Circuit Judge, STEPHENSON, Senior Circuit Judge, and HANSON,* Senior District Judge.

THIS CAUSE came on to be heard upon a petition filed by Randall, Division of Textron, Inc., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on July 21, 1981, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on April 12, 1982, and has considered the briefs and transcript of record filed in this cause. On September 9, 1982, the Court, being fully advised in the premises, issued its decision granting in part and denying in part enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Randall, Division of Textron, Inc., Blytheville, Arkansas, its officers, agents, successors, and assigns, shall:

*The Hon. William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

1. Cease and desist from:

(a) Refusing to offer to qualified unreinstated strikers the opportunity to bid on special rated jobs in preference to strike replacements on the payroll.

(b) Refusing to accord recalled economic strikers their right to shift preference.

(c) Transferring security guards to production jobs in preference to unreinstated economic strikers.

(d) Hiring or recalling strike replacements, following the strike, in preference to unreinstated economic strikers.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer reinstatement and backpay to any unreinstated strikers who, at the compliance stage of this proceeding, are discovered to have been denied an opportunity to bid upon special related jobs, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(b) Offer reinstatement and backpay to strikers who were unlawfully denied reinstatement because Petitioner hired or recalled strike replacements to production jobs, or transferred security guards to production jobs following the termination of the strike on October 16, 1977.

(c) Reinstate the practice of shift preference by seniority.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(e) Post at its plant in Blytheville, Arkansas, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 26 of the National Labor Relations Board (Memphis, Tennessee), after being duly signed by Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps Petitioner has taken to comply herewith.

DATED: November 1, 1982

A true copy

Attest:
Clerk, U.S. Court of Appeals, 8th Circuit
11/29/82

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING IN PART AND DENYING IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING AT WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND WE HAVE BEEN ORDERED TO POST THIS NOTICE TO OUR EMPLOYEES.

The National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves,

To form, join, or support unions,

To bargain as a group through a representative of their choice,

To act together for collective bargaining or other mutual aid or protection,

To refrain from any or all such activities.

WE WILL NOT refuse to offer to qualified unreinstated strikers the opportunity to bid on special rated jobs in preference to strike replacements on the payroll.

WE WILL NOT refuse to accord to recalled economic strikers their right to shift preference.

WE WILL NOT transfer security guards to production jobs in preference to unreinstated economic strikers.

WE WILL NOT refuse to reinstate economic strikers in preference to hiring or recalling strike replacements.

APPENDIX

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by the National Labor Relations Act.

WE WILL offer reinstatement and backpay, with interest, to any unreinstated strikers who were unlawfully denied an opportunity to bid upon special rated jobs because we preferred strike replacements then on the payroll.

WE WILL offer reinstatement and backpay, with interest, to any striker who was unlawfully denied reinstatement because we hired or recalled strike replacements to production jobs, or transferred security guards to production jobs following the termination of the strike on October 16, 1977.

WE WILL reinstate the practice of shift preference in the manner in which it existed prior to the strike which commenced on September 8, 1977.

RANDALL, BURKART/RANDALL
(Division of Textron, Inc.)
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Mid-Memphis Tower—8th Floor, 1407 Union Ave., P.O. Box 41559, Memphis, TN 38104, Telephone (901) 521-2687.

Order of the Court Denying Petition for Rehearing

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 81-1831

Randall, Division of Textron, Inc. Petitioner, v. National Labor Relations Board, Respondent.	On Petition for Review of an Order of the National Labor Relations Board

Filed: October 27, 1982

Before ARNOLD, Circuit Judge, STEPHENSON, Senior Circuit Judge, and HANSON,* Senior District Judge.

The petition for rehearing, or in the alternate for clarification or modification of the opinion, is denied.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

*The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3)

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

Office-Supreme Court, U.S.
FILED
APR 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1257

In the Supreme Court of the United States

OCTOBER TERM, 1982

RANDALL DIVISION OF TEXTRON, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by giving preference to current employees over reinstated strikers in filling vacant special-rated positions.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

RANDALL DIVISION OF TEXTRON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 687 F.2d 1240. The decision and order of the National Labor Relations Board (Pet. App. 19a-55a) are reported at 257 N.L.R.B. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 56a-60a) was entered on November 1, 1982. The petition for a writ of certiorari was filed on January 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et. seq.* are set forth in the petition (Pet. App. 1b).

STATEMENT

1. Petitioner manufactures automotive trim (Pet. App. 24a; Tr. 624-625).[1] Its production and maintenance workers, who are represented by Local No. 1249 of the United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"), are divided into essentially two categories: "production workers," who require no special skills; and "special rated" employees, who work in skilled, more highly paid job classifications (Pet. App. 25a-26a; Tr. 24, 42, 46, 612-614). While production workers were transferred as needed among various departments and production jobs at petitioner's sole discretion (Pet. App. 25a, 30a; Tr. 639), the 1974-1977 contract between petitioner and the Union provided that permanent job vacancies in the special-rated classifications were to be posted so that employees could bid for them. Assignment to most special-rated jobs was based on qualifications and, if the qualifications of bidding employees were relatively equal, on seniority. Other special-rated jobs were awarded on the basis of seniority (Pet. App. 34a-35a; G.C. Exh. 4, at 10, 16). However, if a vacancy in a special-rated position was for ten days or less, petitioner was permitted to forgo the posting procedure and to assign employees at will (Pet. App. 30a; G.C. Exh. 4, at 17).

Negotiations for a new collective bargaining agreement began in the summer of 1977. Following failure to reach a new agreement by September 8, one week after the expiration of the old agreement, the Union commenced an economic strike that was joined by all but a handful of the unit employees. (Pet. App. 26a-27a; Tr. 25-26, 650.) Petitioner immediately began hiring strike replacements. Over the

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[1] "Tr." refers to the transcript of the hearing in the unfair labor practice proceeding; "G.C. Exh." refers to the exhibits introduced by the Board's General Counsel at that proceeding.

next several weeks, a number of strikers returned to work. When all available positions were filled by replacements and returning strikers, petitioner kept a sign-up list for strikers wishing to return and then recalled them, as vacancies arose, in the order in which they had signed up. (Pet. App. 29a; Tr. 28-33, 65-69, 76-77, G.C. Exh. 29(b) and 6.)

The Union ended the strike on October 16 and submitted a reinstatement request on behalf of the remaining strikers (Pet. App. 27a; Tr. 33, 39, G.C. Exh. 7). Because no job vacancies were available at that time, petitioner did not immediately reinstate strikers. As vacancies occurred in the "production worker" classification, petitioner offered reinstatement first to those strikers who had signed petitioner's list and then to the remaining strikers on the Union's list, which gave preference on the basis of seniority. (Pet. App. 29a; Tr. 43, 71-72, 836.) If, however, a vacancy arose in the "special-rated" classifications, petitioner first attempted to fill the vacancy with an employee currently working in the plant. Only if no such qualified employee was found did petitioner permit unreinstated strikers to bid. (Pet. App. 29a; Tr. 44, 74-75, 83-84, 836.)

2. Adopting the decision of the administrative law judge, the National Labor Relations Board found, inter alia, that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by giving strike replacements preference over unreinstated strikers in filling vacancies in the special-rated classifications.

Based upon petitioner's pre-strike practice and the collective bargaining agreement, the Administrative Law Judge (ALJ) held (Pet. App. 30a-31a) that no vacancy occurred when petitioner transferred employees on a short-term basis. The ALJ wrote (*id.* at 30a): "[D]ue to the differing types of production orders which arise weekly (or more often), there is a need for [petitioner] frequently to transfer

production employees from one department to another in order to care for such production schedules. Thus, in such cases, an employee, or employees, may be transferred from one department to another for a short period of time to work on a similar machine in the latter department in order to satisfy the production requirement." The ALJ also held that petitioner had shown a valid business justification for filling production job vacancies by permanent transfers of employees already on the payroll rather than by recalling unreinstated strikers (*id.* at 33a-36a). The ALJ noted (*id.* at 34a) "that, under the prior contract, [petitioner] was free to make interdepartmental moves of similarly rated employees when needed so long as least senior employees were those affected. * * * * This provision was doubtlessly inserted in the contract to enable the Company to transfer employees freely within the plant to similar job functions. The record shows that this policy continued during and after the strike. Thus, no discriminatory motive may be gleaned from a change in means or method of production * * *" (*id.* at 34a).

The ALJ took a different view of petitioner's post-strike practice of posting vacant special-rated positions for bidding by employees then on the payroll and considering unreinstated strikers only if there were no successful bidders on the payroll. The ALJ found that the posted, special-rated positions created job vacancies and that petitioner had failed to establish a business justification for refusing to offer those openings to the unreinstated strikers. He stated (Pet App. 32a-33a): "Whether the special rated job opening arose as a result of a departure from the plant of a permanent replacement or a reinstated striker, or whether it arose from a need by [petitioner] to add to its workforce, the fact remains that a job opening arose for which a striker was qualified and available, and that he was admittedly denied the opportunity even to bid for such job without a showing

by [petitioner] of a substantial and legitimate business reason therefor."

The Board ordered petitioner to offer reinstatement and back pay to those strikers who were not reinstated as a consequence of the unfair labor practice (Pet. App. 20a-2la, 53a-54a).

3. The court of appeals enforced this portion of the Board's order, holding that petitioner's "policy of first offering all special-rated job openings to employees on the payroll instead of to unreinstated strikers discriminated against the strikers on the basis of their participation in union activity" (Pet. App. 5a). The court rejected petitioner's contention that openings that could be filled from within the existing workforce, as opposed to those "resulting from expansion of the workforce" (*id.* at 6a), did not create vacant positions. The court stated (*id.* at 6a; footnote omitted):

> The NLRB's conclusion that special-rated job openings were vacancies which should have been offered to strikers is supported by the posting procedure for such positions contained in the expired collective-bargaining agreement. Thus, prior to the strike, Randall did not unilaterally move employees into special-rated openings, but rather awarded those positions to the most qualified and senior employees who applied. The NLRB decided that Randall's post-strike policy of preferentially considering active employees for special-rated openings discriminated against strikers, because at least some of the openings appeared when replacements left. The preference was given regardless of how an opening arose, and not just when Randall was reshuffling its work force.

The court added (Pet. App. 10a-11a; footnote omitted):

> The record shows that continuously from the end of the strike, while certain strike replacements departed, others were transferred to special-rated jobs, and still others were rehired and recalled from inactive status, all during the same periods of time as some strikers were being reinstated. Whether or not these events were causally related, the practical effect of Randall's procedure, * * * was to make it less likely that strikers would be reinstated to higher-paying positions. Randall's procedure was discriminatory in the same sense as the grant of superseniority in [*NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963)]. Randall gave an additional preference besides permanence to those who remained at work as opposed to those who struck, despite the fact that the latter were still "employees" for legal purposes.

ARGUMENT

Both economic and unfair labor practice strikers retain their status as "employees" under the Act[2] and are thus entitled after the conclusion of the strike to full reinstatement to their former positions without prejudice to their seniority or other employment rights. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.* v. *NLRB*, 414 F.2d 99, 105 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). An employer who denies such reinstatement violates Section 8(a)(1) and (3) of the Act unless he "can show that his action was due to 'legitimate and

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[2]Section 2(3) of the Act, 29 U.S.C. 152(3), defines "employee as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *."

and substantial business justifications.' " *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 378, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). During an economic strike, an employer may hire permanent replacement employees whom he need not displace in order to create vacancies for strikers seeking reinstatement. 389 U.S. at 379; *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). This is so because the "need for the employer to assure permanent employment to the replacements so that the necessary labor force can be obtained to maintain operations during a strike" provides the " 'legitimate and substantial business justification' for requiring replaced economic strikers to wait for reinstatement until a vacancy occurs in the labor force." *Laidlaw Corp.* v. *NLRB, supra*, 414 F.2d at 105, quoting *NLRB* v. *Fleetwood Trailer Co., supra*, 389 U.S. at 379.

However, even in the case of an economic strike, an employer cannot burden the statutory right to strike by granting those who work during the strike a post-strike advantage over strikers. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 223, 236-237 (1963) (an employer cannot lawfully grant replacements or nonstriking employees fictional seniority rights in order to protect them from—and subject the strikers to—future layoffs or terminations).[3] Such

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[3]See also, *e.g.*, *Rogers Manufacturing Co.* v. *NLRB*, 486 F.2d 644, 646-648 (6th Cir. 1973), cert. denied, 416 U.S. 937 (1974) (right to strike abridged where employer denies employees seeking reinstatement full credit for their previously accrued seniority); *Great Lakes Carbon Corp.* v. *NLRB*, 360 F.2d 19, 20-21 (4th cir. 1966) (right to strike abridged where employer grants employees who abandon a strike preference with respect to protection from layoff, preferred shifts, and other employment rights); *Swarco, Inc.* v. *NLRB*, 303 F.2d 668, 670-673 (6th Cir. 1962), cert. denied, 373 U.S. 931 (1963) (right to strike abridged where employer promises employees who abandon a strike immunity from "bumping" by later returning strikers with greater seniority).

action is so "inherently destructive" of the right to strike as to be unlawful without the need of further inquiry into the employer's motivation. 373 U.S. at 231, 236-237; *NLRB* v. *Great Dane Trailers, Inc., supra*, 388 U.S. at 34. In this case, the Board and court of appeals correctly concluded that petitioner's conduct—preferring current employees over unreinstated strikers in filling special-rated positions—constituted just such an impermissible burden upon the right to strike.

Petitioner contends (Pet. 11) that the special-rated vacancies were "jobs activated by fluctuating production demands that could be filled by a reshuffling of the current workforce" and that it was therefore improper to require petitioner to offer those openings to the strikers. As previously noted, however, in those instances in which the Board found that vacancies were actually created by fluctuating production demands, it found that petitioner had acted lawfully in filling them from the current workforce. However, the Board and the court of appeals found that the posted special-rated openings were true vacancies and that petitioner had not provided any valid business justification for preventing the unreinstated strikers from bidding for them. To the extent that petitioner challenges the findings below concerning the nature of the particular vacancies at issue here, petitioner raises a factual issue that does not warrant further review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

There is also no merit to petitioner's contention (Pet. 11-12) that it was entitled to offer the special-rated openings to employees already on the payroll because those openings did not occur as a result of an expansion of the workforce. The vacancies at issue occurred in job classifications different from those occupied by the strike replacements. Thus, no strike replacement would have been displaced from his current position if those vacancies had been filled by

unreinstated strikers. To be sure, a strike replacement who might otherwise have been laid off might have been able to remain on the payroll if given preference for a vacant special-rated position, but under petitioner's pre-strike practice, such vacancies were not offered to employees who otherwise would have been laid off. Instead, those vacancies were posted and filled on the basis of seniority and skill.[4] Accordingly, as the Board and the court of appeals concluded, petitioner's new system of awarding special-rated openings went beyond guaranteeing strike replacements the permanent positions sanctioned in *Mackay* and amounted to the kind of superior job security or tenure rights prohibited by *Erie Resistor*.[5]

Contrary to petitioner's contention (Pet. 13-15), there is no confilct between this case and the Seventh Circuit's decision in *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (1982). In that case, the court held that the employer did not commit an unfair labor practice by giving laid-off workers recall rights superior to those of unreinstated strikers. The court distinguished cases holding that unreinstated strikers have a right to reinstatement when a vacancy occurs, stating (*id.* at 931):

> A layoff, by definition, is not a termination of the employment relationship * * *. There is, therefore, no creation of a "vacancy" in the work force which would entitle a striker to reinstatement * * *.

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[4]The collective bargaining agreement upon which petitioner's pre-strike practice was based also made no distinction between employees on the payroll and those awaiting recall for purposes of bidding on special-rated jobs (G.C. Exh. 4, at 16, 13).

[5]The preference granted by petitioner in this case has essentially the same result as the grant of super-seniority for layoff purposes in *Erie Resistor*. The priority given effectively acts as protection against layoff so that the current employee whose job would otherwise be eliminated retains his "active" status to the permanent disadvantage of the unreinstated strikers.

The present case, by contrast, does not involve the rights of laid-off replacements, and the court of appeals expressly agreed (Pet. App. 12a) with *Giddings & Lewis* that "the lay-off of a permanent replacement, who had been given a definite expectation of recall, did not amount to a 'vacancy.' " However, the court concluded, 675 F.2d at 931, that the Board had "permissibly treated openings in special-rated jobs as 'vacancies.' "

There is also no conflict between the present case and *Lodges 743 & 1746, IAM* v. *United Aircraft Corp.*, 534 F.2d 422, 442 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976) (Pet. 15-16). There, the court held that *Erie Resistor* did not preclude a strike settlement agreement that permitted the transfer of strike replacements in order to correct production imbalances *caused by the strike*. The court noted that the permanent employment offered to replacements would be illusory if they were required to "be laid off as a result of production adjustments made necessary by the same strike" (534 F.2d at 442 n.35). Accordingly, the court concluded that the strike settlement agreement did not give the replacements the kind of enhanced seniority found impermissible in *Erie Resistor*. Here, on the other hand, petitioner's system of filling special-rated vacancies went beyond protecting strike replacements against adjustments caused by the termination of the strike and granted them preference over unreinstated strikers in the competition for new, more desirable openings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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